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Nos. 07-1090 & 08-539

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

REPUBLIC OF IRAQ,

Petitioner,

v.

JORDAN BEATY, et al.,

Respondents.

REPUBLIC OF IRAQ, et al.,

Petitioners,

v.

ROBERT SIMON, et al.,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether the Republic of Iraq possesses sovereign immunity from the jurisdiction of the courts of the United States in cases involving alleged misdeeds of the Saddam Hussein regime that are predicated on the exception to immunity in former 28 U.S.C. § 1605(a)(7).

PARTIES TO THE PROCEEDINGS

Petitioners are the Republic of Iraq, which was a defendant and appellant below in No. 07-1090 ("*Beaty*") and defendant and appellee in No. 08-539 ("*Simon / Seyam*"), and Jalal Talibani in his official capacity as President of Iraq, who is a defendant in the *Simon / Seyam* cases. Pursuant to S. Ct. R. 35.3, President Talibani has been substituted for Saddam Hussein, who was named as a defendant in the *Simon / Seyam* cases but is now deceased. The Iraqi Intelligence Service ("IIS") was also a named defendant in the *Simon / Seyam* cases, but it has since been dissolved. *See* Coalition Provisional Authority Order No. 2 (May 23, 2003) (www.iraqcoalition.org/regulations/20030823_CPAORD_2_Dissolution_of_Entities_with_Annex_A.pdf). To the extent the former IIS nevertheless remains a party, IIS is also a petitioner. *See* 08-539 Pet. at ii.

Respondents are (a) Jordan Beaty; Austin Makenzie Beaty, a minor by her next friend Robin Beaty; William R. Barloon; Bryan C. Barloon; and Rebecca L. Barloon, who were plaintiffs and appellees below in *Beaty*; and (b) Robert Simon; Françoise Simon; Robert Alvarez; Roberto Alvarez; Islamic Society of Wichita (substituted in the Court of Appeals for Nabil Seyam); Ahmad Seyam; Yusef Seyam; Melissa Seyam; and Carrie Seyam, who were plaintiffs and appellants below in the *Simon / Seyam* cases.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
INTRODUCTION	2
STATEMENT OF THE CASE	4
A. Foreign Sovereign Immunity And The State-Sponsor-Of-Terrorism Exception	4
B. The President's EWSAA Determination	6
C. The Complaints	8
1. *Beaty*	8
2. *Simon / Seyam*	8
D. The *Acree* Decision And The *Beaty* Proceedings	10
E. The *Simon / Seyam* Proceedings And The NDAA	13
SUMMARY OF THE ARGUMENT	18
ARGUMENT	21

TABLE OF CONTENTS

		Page
I.	THE PRESIDENT'S EWSAA DETERMINATION MADE FORMER SECTION 1605(A)(7) INAPPLICABLE TO IRAQ	22
A.	The Plain Language Of The EWSAA Authorized The President To Make Section 1605(a)(7) Inapplicable To Iraq	22
B.	The EWSAA's History And Context Confirm Its Plain Language	29
C.	NDAA Section 1083(c)(4) Does Not Affect The President's EWSAA Determination	34
II.	THE NDAA'S REPEAL OF FORMER SECTION 1605(A)(7), AND THE PRESIDENT'S WAIVER OF ITS REPLACEMENT, HAVE ELIMINATED ANY CLAIMED BASIS FOR SUBJECT MATTER JURISDICTION	37
A.	There Is No Jurisdiction Under The Plain Language Of The Governing Statutes	38
B.	Nothing In Section 1083 Limits The Repeal Of Section 1605(a)(7)	40

TABLE OF CONTENTS

Page

C. The Provisions Relied On By The D.C. Circuit Do Not Overcome Or Undermine The Repeal Of Section 1605(a)(7) 45

III. THE RESTORATION OF IRAQ'S SOVEREIGN IMMUNITY EFFECTUATES IMPORTANT FOREIGN POLICIES 50

CONCLUSION 57

APPENDIX OF STATUTORY PROVISIONS

TABLE OF AUTHORITIES

Page(s)

CASES:

Abur v. *Republic of Sudan*, 437 F. Supp. 2d 166 (D.D.C. 2006) 47

Acree v. *Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004) ..... *passim*

Acree v. Republic of Iraq, No. 06-723 (D.D.C.) 9

Alaska v. *United States*, 545 U.S. 75 (2005) 26

Ali v. *Fed. Bureau of Prisons*, 128 S. Ct. 831 (2008) 24, 25, 28

Am. Express Co. v. *United States*, 212 U.S. 522 (1909) 26

Am. Ins. Ass'n v. *Garamendi*, 539 U.S. 395 (2003) 31, 42, 56

Argentine Republic v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) 21

Bender v. *Williamsport Area Sch. Dist.*, 475 U.S. 534 (1986) 39

Brogan v. *United States*, 522 U.S. 398 (1998) 29

Bruner v. *United States*, 343 U.S. 112 (1952) 39, 47

Caterpillar, Inc. v. *Williams*, 482 U.S. 386 (1987) 46

Daliberti v. *Fed. Reserve Bank of N.Y.*, No. 03-01055 (S.D.N.Y. 2003) 8

TABLE OF AUTHORITIES—Continued

Page(s)

Daliberti v. *Republic of Iraq*, 146 F. Supp. 2d 19 (D.D.C. 2001)..... 8

Dames & Moore v. *Regan*, 453 U.S. 654 (1981)..... 30, 31, 42

Dep't of the Navy v. *Egan*, 484 U.S. 518 (1988)..... 31

Ex parte McCardle, 74 U.S. 506 (7 Wall.) (1868)..... 22, 32

Ex parte Republic of Peru, 318 U.S. 578 (1943)..... 4, 57

Garcia v. *United States*, 469 U.S. 70 (1984)..... 44

Hamdan v. *Rumsfeld*, 548 U.S. 557 (2006)..... 40, 41, 44

Harrison v. *PPG Industries, Inc.*, 446 U.S. 578 (1980)..... 23, 24, 25

Haynes v. *United States*, 390 U.S. 85 (1968)..... 36

Hill v. *Republic of Iraq*, No. 99-03346 (D.D.C.)..... 10

Hughes Aircraft Co. v. *Jacobson*, 525 U.S. 432 (1999)..... 22

Hwang Geum Joo v. *Japan*, 413 F.3d 45 (D.C. Cir. 2005)..... 56

In re Republic of Iraq, No. 07-8004 (D.C. Cir.)..... 12

In re Terrorist Attacks on September 11, 2001, No. 03 MDL 1570 (S.D.N.Y.)..... 9

Kalasho v. *Republic of Iraq*, No. 06-11030 (E.D. Mich.)..... 10

TABLE OF AUTHORITIES—Continued

Page(s)

Kilburn v. *Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123 (D.C. Cir. 2004) 12

Kokkonen v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994) 38

Koshkonong v. *Burton*, 104 U.S. (14 Otto) 668 (1881) 36

Landgraf v. *USI Film Prods.*, 511 U.S. 244 (1994) 42

Lauritzen v. *Larsen*, 345 U.S. 571 (1953) 51

Lawton v. *Republic of Iraq*, No. 02-474 (D.D.C.) 9

Mackey v. *Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825 (1988) 36

McNeil v. *United States*, 508 U.S. 106 (1993) 28

Pa. Dep't of Corr. v. *Yeskey*, 524 U.S. 206 (1998) 29, 30

Permanent Mission of India to the United Nations v. *City of New York*, 127 S. Ct. 2352 (2007) 12

Princz v. *Fed. Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994) 56

Quern v. *Mandley*, 436 U.S. 725 (1978) 44

Rainwater v. *United States*, 356 U.S. 590 (1958) 35

Republic of Austria v. *Altmann*, 541 U.S. 677 (2004) 39, 55

Republic of Mexico v. *Hoffman*, 324 U.S. 30 (1945) 4, 50, 55

TABLE OF AUTHORITIES—Continued

Page(s)

Rich v. *Naviera Vacuba S.A.*, 295 F.2d 24 (4th Cir. 1961) 55

Salinas v. *United States*, 522 U.S. 52 (1997) 22

Saudi Arabia v. *Nelson*, 507 U.S. 349 (1993) 5

Schwegmann Bros. v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951) 44

S.D. Warren Co. v. *Maine Bd. of Envtl. Prot.*, 547 U.S. 370 (2006) 25, 26

Smith v. *Islamic Emirate of Afg.*, 262 F. Supp. 2d 217 (S.D.N.Y. 2003) 10

South Dakota v. *Yankton Sioux Tribe*, 522 U.S. 329 (1998) 36

Sullivan v. *Finkelstein*, 496 U.S. 617 (1990) 36

The Assessors v. *Osbornes*, 76 U.S. 567 (1869) 39

The Schooner Exchange v. *McFaddon*, 11 U.S. (7 Cr.) 116 (1812) 51

United States v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) 30

United States v. *Gonzales*, 520 U.S. 1 (1997) 23, 28, 29

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Verlinden B.V. v. *Central Bank of Nigeria*, 461 U.S. 480 (1983) 4, 5, 31

Vine v. *Republic of Iraq*, No. 01-2674 (D.D.C.) 9, 13

TABLE OF AUTHORITIES—Continued

Page(s)

CONSTITUTIONAL PROVISION:

U.S. Const. art. I, § 7 14

STATUTES:

8 U.S.C. § 1735 25
15 U.S.C. § 57(b) 25
22 U.S.C. § 4305(d) 25
26 U.S.C. § 901(j) 25
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1292(b) 12
28 U.S.C. § 1330(a) ..... *passim*
28 U.S.C. § 1605(a)(7) (2000) (repealed) .... *passim*
28 U.S.C. § 1605A ..... *passim*
28 U.S.C. § 1610(a) 42
28 U.S.C. § 1610(f) 43
28 U.S.C. § 2254(i) 46
28 U.S.C. § 2680(c) 24
Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 6
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TABLE OF AUTHORITIES—Continued

Page(s)

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Foreign Assistance Act of 1961, § 620A, added by Pub. L. No. 94-329, § 303 (1976), codified as 22 U.S.C. § 2371 ..... *passim*

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Iraq Sanctions Act of 1990, Pub. L. No. 101-513, § 586, 104 Stat. 2047 ..... 26, 27, 28, 34

Libyan Claims Resolution Act, Pub. L. No. 110-301, 122 Stat. 2999 (2008)..... 33

National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 338 ..... *passim*

§ 1083(a)..... 14, 15, 16

§ 1083(b)(1)..... 15, 38

§ 1083(b)(2)..... 41

§ 1083(b)(3)..... 41, 43

§ 1083(c)(1)..... 45, 46

§ 1083(c)(2)..... 45, 49

§ 1083(c)(3)..... 41, 46, 48, 49

§ 1083(c)(4)..... *passim*

§ 1083(d)(1) 15, 16, 37, 49

TABLE OF AUTHORITIES—Continued

Page(s)

§ 1083(d)(2) 16, 41, 49

§ 1083(d)(4) 16, 44, 56

EXECUTIVE MATERIALS:

55 Fed. Reg. 37,793 (1990) 5, 27

69 Fed. Reg. 61,702 (2004) 5

73 Fed. Reg. 63,540 (2008) 33

Executive Order 13,303, 68 Fed. Reg. 31,931 (2003) 7

Memorandum of Disapproval, 43 Weekly Comp. Pres. Doc. 1641 (Dec. 28, 2007) 14, 55

Message to the Congress, 39 Weekly Comp. Pres. Doc. 647 (May 22, 2003) 7

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Presidential Determination No. 2006-14, 71 Fed. Reg. 31,909 (2006) 33

Presidential Determination No. 2008-09, 73 Fed. Reg. 6571 (2008) 16, 17

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TABLE OF AUTHORITIES—Continued

Page(s)

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H.R. Conf. Rep. No. 108-337 (2003) 34

H.R. Rep. No. 110-477 (2007) 14, 43, 46

S. 762, § 503, 108th Cong. (2003) 29

RULES:

Fed. R. Civ. P. 54(b) 47

Sup. Ct. R. 35.3 ii

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TABLE OF AUTHORITIES—Continued

Page(s)

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Webster's Third New International Dictionary (1976) 23

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The unreported order of the D.C. Circuit granting summary affirmance in *Beaty* is reproduced at JA313. The District Court's opinion is reported at 480 F. Supp. 2d 60 and is reproduced at JA219. The opinion of the D.C. Circuit in *Simon/Seyam* is

reported at 529 F.3d 1187 and is reproduced at JA317. The District Court's opinion is reported at 459 F. Supp. 2d 10 and is reproduced at JA188.

JURISDICTION

In *Beaty*, the judgment of the D.C. Circuit was entered on November 21, 2007. JA313. In *Simon / Seyam*, the judgment of the D.C. Circuit was entered on June 24, 2008. JA339. This Court granted petitioners' timely petitions for certiorari on January 9, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The text of relevant statutes is set forth in the appendix to this brief.

INTRODUCTION

The question in this case is whether the sovereign immunity of petitioner Republic of Iraq ("Iraq")—now an important, democratic ally of the United States—has been restored through actions of Congress and the President. These actions implemented crucial foreign policy and diplomatic determinations that reflect the two nations' new relationship following the ouster of the former Iraqi regime. The lower court countermanded foreign policy judgments made by the President pursuant to broad statutory authorization, and held that Iraq is not entitled to the same sovereign immunity that applies to other U.S. allies.

That decision was manifestly erroneous for each of two reasons. First, in 2003, the President exercised the full authority Congress granted him to "make inapplicable with respect to Iraq * * * *any* * * * provision of law that applies to countries that have supported terrorism." Emergency Wartime

Supplemental Appropriations Act, 2003 ("EWSAA"), Pub. L. No. 108-11, § 1503, 117 Stat. 559, 579 (emphasis added). As the President properly determined, this statute authorized him to immediately make inapplicable as to Iraq former 28 U.S.C. § 1605(a)(7), a jurisdictional exception to Iraq's sovereign immunity that applied *only* to countries that have supported terrorism. Because that provision is the only asserted or arguable basis for abrogation of Iraq's sovereign immunity—and thus the existence of subject matter jurisdiction—in these cases, the cases may not proceed.

Second, regardless of the President's 2003 actions, in the National Defense Authorization Act for Fiscal Year 2008 ("NDAA"), Pub. L. No. 110-181, § 1083, 122 Stat. 338, Congress (1) *repealed* 28 U.S.C. § 1605(a)(7); and (2) simultaneously replaced that statute with a new jurisdictional exception to immunity, which it provided the President with authority to waive as to Iraq; and (3) the President then waived application of that exception as to Iraq under the new authority Congress expressly granted him. For this reason as well, there is no basis for subject matter jurisdiction in these cases.

Implementing clear statutory authority and important foreign policy judgments, the President determined that claims against the new democratic government of Iraq based on the actions of the deposed Saddam Hussein regime should be addressed diplomatically, just as claims against allied nations for the actions of prior hostile regimes have been addressed in the past. Whether considered under the EWSAA or the NDAA, the lower court's refusal in both *Beaty* and *Simon/Seyam* to recognize the restoration of Iraq's basic sovereign

immunity is contrary to law and, if upheld, would threaten critical U.S. foreign policy objectives and the important U.S.-Iraq alliance.

STATEMENT OF THE CASE

A. Foreign Sovereign Immunity And The State-Sponsor-Of-Terrorism Exception.

"[F]oreign sovereign immunity is a matter of grace and comity on the part of the United States." *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). Before passage of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), "initial responsibility for deciding questions of sovereign immunity fell primarily upon the Executive." *Id.* at 487. Even where a court's jurisdiction had previously attached against a foreign sovereign, that jurisdiction would be "surrendered on recognition, allowance, and certification of the asserted immunity by the political branch of the government charged with the conduct of foreign affairs." *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 34 (1945).

Because judicial proceedings against a foreign sovereign or its possessions "may be regarded as such an affront to its dignity and may so affect our relations with it," it was "an accepted rule of substantive law governing the exercise of the jurisdiction of the courts that they accept and follow the executive determination" to accord immunity. *Id.* at 35-36. The court would then "remit the [plaintiff] to the relief obtainable through diplomatic negotiations." *Ex parte Republic of Peru*, 318 U.S. 578, 588 (1943).

In 1976, the FSIA codified foreign sovereign immunity. The original statute adopted the "restrictive" theory, which immunized a foreign sov-

ereign's "public acts" but not its "strictly commercial acts." *Verlinden*, 461 U.S. at 487. The underlying acts in the present cases were allegedly committed between 1991 and 1995. Because the acts were noncommercial, the FSIA accorded Iraq's government under Saddam Hussein immunity from U.S. jurisdiction for such acts. *See, e.g., Saudi Arabia* v. *Nelson*, 507 U.S. 349, 359-360 (1993).

In 1996, however, Congress enacted a new immunity exception, formerly codified at 28 U.S.C. § 1605(a)(7) ("former Section 1605(a)(7)"), that applied only to nations designated by the State Department as "state sponsors of terrorism." Reflecting U.S hostility to such regimes, that provision abrogated immunity for certain claims involving "an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources * * * for such an act." 28 U.S.C. § 1605(a)(7) (2000) (repealed). Iraq once was, but no longer is, a designated "state sponsor of terrorism." *See* 55 Fed. Reg. 37,793 (1990); 69 Fed. Reg. 61,702 (2004).

One of many sanctions imposed by the United States against state sponsors of terrorism, Section 1605(a)(7) represented a "sudden and dramatic shift" from the restrictive theory of immunity, because it authorized, for the first time, suits against foreign states for noncommercial acts committed abroad. Daveed Gartenstein-Ross, *A Critique of the Terrorism Exception to the Foreign Sovereign Immunities Act*, 34 N.Y.U. J. Int'l L. & Pol. 887, 898 (2002). Even as to outlaw states, this abrogation of immunity was unusual in international relations; as of 2002, "no other countries ha[d] implemented legislation similar to the terrorism exception, with

the sole exception of retaliatory legislation aimed at the United States." *Id.*[1]

B. The President's EWSAA Determination.

On October 16, 2002, Congress authorized the President to use military force against Iraq. *See* Pub. L. No. 107-243, 116 Stat. 1498 (2002). Five months later, the United States led a coalition of military forces into Iraq. By May 1, 2003, major combat operations had ended and the Saddam Hussein regime had been ousted. *See* Amy Goldstein & Karen DeYoung, *Bush to Say Major Combat Has Ended*, Wash. Post, May 1, 2003, at A18. The focus of the United States then shifted immediately to reconstructing Iraq and helping the Iraqi people develop a new, democratic government.

Shortly after the invasion, Congress passed the EWSAA to fund operations in Iraq and begin providing for the reconstruction. Section 1503 of that law provided, *inter alia*, that "the President may make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961"—a specific sanctions law applying to state sponsors of terrorism—"or *any other provision of law that applies to countries that have supported terrorism*." EWSAA § 1503 (emphasis added).

On May 7, 2003, President Bush issued Presidential Determination No. 2003-23, which lifted various other sanctions against Iraq and expressly exercised the full extent of his EWSAA authority to make inapplicable with respect to Iraq "*any * * * provision of law* that applies to countries that have supported terrorism." 68 Fed. Reg. 26,459 (2003)

[1] This retaliatory legislation was not enacted by Iraq. *Id.* at 918 n.153.

(emphasis added) (JA396). On May 22, 2003, the President confirmed to Congress that this action included rendering former Section 1605(a)(7) inapplicable with respect to Iraq. *Message to the Congress*, 39 Weekly Comp. Pres. Doc. 647, 647-48 (May 22, 2003) (provisions of law made inapplicable "include, but are not limited to, 28 U.S.C. 1605(a)(7)") (JA403). The effect of that determination should have been to render Iraq once again immune from the jurisdiction of the courts of the United States in these and similar cases.

Also on May 22, 2003, the President issued Executive Order 13,303, in which he declared that the threat of judicial process against Iraqi assets "obstructs the orderly reconstruction of Iraq, the restoration and maintenance of peace and security in the country, and the development of political, administrative, and economic institutions in Iraq." 68 Fed. Reg. 31,931 (2003). The President declared that "[t]his situation constitutes an unusual and extraordinary threat to the national security and foreign policy of the United States." *Id.*

The Executive Order prohibited attachments against numerous Iraqi assets. In his message to Congress, the President declared that it is "[a] major national security and foreign policy goal of the United States" to ensure that all "Iraqi resources"—not merely those that were the main subject of the Order—are dedicated to reconstruction of Iraq and "other purposes benefiting the people of Iraq." JA402-03. He explained that he had taken actions to protect Iraqi property from judicial process, which "jeopardiz[ed] the full dedication of such assets to purposes benefiting the people of Iraq." JA403. The President stated that one of these actions was his

earlier Determination making Section 1605(a)(7) inapplicable to Iraq. *Id.* Thus, the President effectively confirmed that these cases, and others like them, pose a threat to the national security and foreign policy goals that he had identified.

C. The Complaints.

1. *Beaty.*

The *Beaty* plaintiffs are the children of Kenneth Beaty and William Barloon. In 1996, these men and their spouses sued Iraq in an earlier case, under the auspices of former Section 1605(a)(7), alleging improper detention and treatment by the Saddam Hussein regime in 1993 and 1995. *See* JA383-87. The Beatys and Barloons obtained—and ultimately recovered on—a default judgment for more than $10 million. *See Daliberti* v. *Republic of Iraq*, 146 F. Supp. 2d 19 (D.D.C. 2001); Order, *Daliberti* v. *Fed. Reserve Bank of N.Y.*, No. 1:03-cv-01055-JES (S.D.N.Y. Mar. 14, 2003).

The current plaintiffs were not present in Iraq during their fathers' detention. *See* JA183-84 (¶¶ 23, 24). Nevertheless, on March 10, 2003, they filed this Section 1605(a)(7) case against Iraq seeking additional millions of dollars for "emotional distress" they allegedly suffered because of their fathers' treatment. The plaintiffs subsequently clarified that they were suing under the common law of the states where they lived. JA180.

2. *Simon/Seyam.*

Simon / Seyam consists of two consolidated cases, *Simon* v. *Republic of Iraq* and *Seyam* v. *Republic of Iraq*. Plaintiffs Robert Simon, Roberto Alvarez, and Nabil Seyam (now deceased) alleged that they were taken prisoner and mistreated by the former Iraqi

regime in 1991, during the First Gulf War. JA166, JA176. Mr. Simon and Mr. Alvarez were released after six weeks of detention. JA166. Mr. Seyam was released after eighteen days. JA176.

In 2003—more than 12 years after the underlying events and nearly seven years after Section 1605(a)(7)'s enactment—these plaintiffs and family members filed suit against Iraq under that provision seeking more than $243 million in compensatory and punitive damages as a result of the alleged mistreatment by the prior regime. The plaintiffs allege causes of action under District of Columbia law.[2]

In May 2005, the trial judge consolidated *Simon* and *Seyam* with another similar case on his docket, *Vine* v. *Republic of Iraq*, No. 01-CV-2674. *Vine* remains pending in the trial court and involves 236 plaintiffs. Including *Vine* and the present cases, Iraq is subject to pending lawsuits brought under former Section 1605(a)(7) that collectively seek more than $3 billion in damages.[3]

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[2] The *Simon/Seyam* defendants are the Republic of Iraq, then-President Saddam Hussein (for whom President Talibani has been substituted) and the since-dissolved IIS. *See supra* at ii. Because the FSIA and former Section 1605(a)(7) are the only asserted or arguable bases for jurisdiction over all defendants, JA162, JA172, all arguments in this brief apply to all defendants. *See also* JA202-03 (plaintiffs' assertion, as to all defendants, of 10-year statute of limitations applicable to Section 1605(a)(7) actions).

[3] *See Vine* v. *Republic of Iraq*, No. 01-2674 (D.D.C.) (claims for $400 million); *Acree* v. *Republic of Iraq*, No. 06-723 (D.D.C.) (renewed complaint seeking to reinstate claims for $959 million); *Lawton* v. *Republic of Iraq*, No. 02-474 (D.D.C.) (claims for more than $125 million in actual damages and $1.4 billion in punitive damages); *In re Terrorist Attacks on September 11, 2001*, No. 03-MDL-1570 (S.D.N.Y.) (asserted liability against all

D. The *Acree* Decision And The *Beaty* Proceedings.

In March 2004, the United States urged dismissal of *Beaty*, asserting that the President's EWSAA Determination had restored Iraq's sovereign immunity. *See* JA64. The United States also elucidated the key foreign policy concerns that had led the President to issue that Determination and make it applicable to Section 1605(a)(7). It stated that adjudication of the case poses "a serious threat to the crucial foreign policy goal of promptly rebuilding Iraq into a democratic, self-sustaining nation," would "significantly interfere with the successful establishment of a new, peaceful government," and "stand[s] as an obstacle to achieving the Nation's foreign policy goals." JA78, JA79, JA83.

On June 4, 2004, however, the D.C. Circuit held in *Acree* v. *Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004), that the President's EWSAA determination exceeded his statutory authority. Although Iraq was the named defendant in that case, *Acree* involved different plaintiffs and different claims from the present cases, and Iraq did not appear in *Acree* either in the District Court or the D.C. Circuit. Instead, the United States intervened to appeal a $959 million default judgment against Iraq, arguing that the President's determination to render former

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defendants of more than $1 trillion); JA184 (*Beaty* complaint seeking $2,176,000); JA169, JA179 (*Simon* and *Seyam* complaints seeking more than $243,000,000); *Kalasho* v. *Republic of Iraq*, No. 06-11030 (E.D. Mich.) (claims for more than $10 million); *see also Hill* v. *Republic of Iraq*, No. 99-03346 (D.D.C.) (default judgments for more than $172 million); *Smith* v. *Islamic Emirate of Afg.*, 262 F. Supp. 2d 217 (S.D.N.Y. 2003) (default judgment against Iraq for more than $63 million).

Section 1605(a)(7) inapplicable to Iraq was a valid exercise of his EWSAA authority.

A divided D.C. Circuit panel rejected that argument. Even though EWSAA § 1503 expressly authorized the President to make inapplicable with respect to Iraq "*any* * * * provision of law that applies to countries that have supported terrorism," EWSAA § 1503 (emphasis added), and even though Section 1605(a)(7) was a provision of law that applied *only* to countries that have supported terrorism, the panel interpreted Section 1503 narrowly to include only "legal restrictions on assistance and funding for the new Iraqi Government." *Acree*, 370 F.3d at 57.

But even the majority found that this was an "exceedingly close question," *id.* at 51, and its analysis was refuted by then-Judge Roberts, who disagreed on this point. As he explained, the EWSAA language "'[a]ny other provision' should be read to mean 'any other provision,' not, as the majority would have it, 'provisions that present obstacles to assistance and funding for the new Iraqi Government.'" *Id.* at 60 (Roberts, J., concurring) (citation omitted).

The panel nevertheless vacated the entire judgment against Iraq, holding that "generic common law" may not furnish a cause of action in a Section 1605(a)(7) case and that plaintiffs failed to "identify a particular cause of action arising out of a specific source of law." *Id.* at 59. Because the judgment was vacated, there was no opportunity for the United States to seek *en banc* or Supreme Court review of the panel majority's jurisdictional holding on the EWSAA issue.

In 2005, Iraq retained counsel in *Beaty* and moved to dismiss. Plaintiffs moved for partial summary judgment on liability. On March 20, 2007, the trial court (the Hon. John D. Bates) granted in part and denied in part both motions. The court first determined that, under *Acree*, Iraq was not entitled to sovereign immunity as a result of the President's EWSAA Determination. JA236-37. Judge Bates stated, however, that Judge Roberts' opinion in *Acree* has "considerable force" and that the court "would be inclined to adopt that position if free to do so." *Id.* The court then addressed, in the bulk of its opinion, Iraq's alternative grounds for dismissal, including arguments under the political question, foreign affairs preemption, and Act of State doctrines.

Because the denial of sovereign immunity was immediately appealable as a collateral order, *see, e.g.*, *Permanent Mission of India to the United Nations* v. *City of New York*, 127 S. Ct. 2352, 2355 (2007); *Kilburn* v. *Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1126 (D.C. Cir. 2004), Iraq timely noticed an appeal from the District Court's March 20 order.[4]

The plaintiffs moved for summary affirmance on the basis of *Acree*. Iraq filed a petition for initial hearing *en banc*, urging the D.C. Circuit to

[4] That decision primarily addressed Iraq's alternative grounds for dismissal. Because these issues (unlike sovereign immunity) may not otherwise have been immediately appealable, Judge Bates certified that order for interlocutory appeal under 28 U.S.C. § 1292(b), and Iraq petitioned the D.C. Circuit for acceptance of that appeal. The D.C. Circuit has held that petition in abeyance pending this Court's decision in this case. *See* Order of Sept. 24, 2008, *In re Republic of Iraq*, No. 07-8004 (D.C. Cir.). If this Court holds that Iraq's sovereign immunity has been restored, that petition would be moot.

reconsider and overrule *Acree*. The United States filed an amicus brief urging that the petition be granted. The D.C. Circuit denied the petition, with Judges Kavanaugh and Brown dissenting. JA311.

On November 21, 2007, a D.C. Circuit motions panel granted plaintiffs' motion for summary affirmance. Citing only *Acree*, the panel ruled that "[t]he district court correctly held that the Republic of Iraq's sovereign immunity, waived or abrogated under 28 U.S.C. § 1605(a)(7), has not been restored under the [EWSAA] and Presidential Determination 2003-23." JA313.

E. The *Simon/Seyam* Proceedings And The NDAA.

In 2005, Iraq retained counsel in *Simon*, *Seyam*, and *Vine*, and moved to dismiss. On September 6, 2006, after it had consolidated the cases, the trial court (the Hon. Henry H. Kennedy, Jr.) ruled on the motions. The court first concluded that it possessed subject matter jurisdiction under former Section 1605(a)(7). JA200. *See also* Mem. and Order, *Vine* v. *Republic of Iraq*, No. 01-CV-2674 (D.D.C. July 20, 2004) (holding, under *Acree*, that Iraq's immunity was not restored). The court then rejected Iraq's contention that the plaintiffs' claims were non-justiciable. JA200-02. The court also held that the *Vine* plaintiffs' claims were not time-barred, and denied Iraq's motion in its entirety as to those claims. JA210-11. The court, however, dismissed the *Simon* and *Seyam* claims as barred by the ten-year statute of limitations. JA211. Those plaintiffs appealed the dismissals.

On December 14, 2007—after the *Simon*/*Seyam* appeal had been briefed and argued in the D.C.

Circuit—Congress passed the initial version of the NDAA. The main purpose of that bill was to authorize funding for the military. However, NDAA § 1083 ("Section 1083") sought to amend the FSIA to provide for new jurisdictional, liability, attachment, and other provisions for litigation against current and former state sponsors of terrorism. One provision sought to overrule the District Court's statute-of-limitations decision in *Simon / Seyam*. *See* NDAA, § 1083(a)(1) (enacting 28 U.S.C. § 1605(b)). Another purported to state the current Congress' view on the intent of the earlier Congress that had enacted the EWSAA in 2003. *See* NDAA, § 1083(c)(4). Section 1083 had originally been introduced as an amendment on the Senate floor, and there were no hearings or substantive debate on it. In particular, Section 1083(c)(4) was an entirely new provision inserted in conference committee with no debate or even identification of its sponsor. *Compare* H.R. Rep. No. 110-477, at 338-344 (2007) *with* 153 Cong. Rec. S12631-32 (Oct. 3, 2007).

On December 28, 2007, the President announced his veto of the entire NDAA solely because of the effect of Section 1083 as it would have applied to litigation against Iraq. In his memorandum of disapproval returning the bill to the House of Representatives, the President explained that Section 1083, if allowed to become law, "would undermine the foreign policy and commercial interests of the United States." *Memorandum of Disapproval*, 43 Weekly Comp. Pres. Doc. 1641 (Dec. 28, 2007) (JA411). The President stated his view that the intervening adjournment of Congress had prevented the return of the bill, thereby effectuating a "pocket veto" within the meaning of Article I, Section 7 of the

Constitution. JA414. However, in addition to taking that position, the President announced that "I am also sending H.R. 1585 to the Clerk of the House of Representatives, along with this memorandum setting forth my objections, to avoid unnecessary litigation about the non-enactment of the bill that results from my withholding approval and to leave no doubt that the bill is being vetoed." *Id.*

Following the veto, Congress swiftly enacted a new NDAA. The only significant difference between the new NDAA and the vetoed bill was in Section 1083. As enacted, Section 1083 expressly repeals former 28 U.S.C. § 1605(a)(7), the only asserted basis for jurisdiction in these cases. *See* NDAA, § 1083(b)(1)(A)(iii) ("Section 1605 of title 28, United States Code, is amended * * * in subsection (a) * * * by striking paragraph (7)"). In its place, Congress enacted a new jurisdictional exception to immunity for state sponsors of terrorism, now codified at 28 U.S.C. § 1605A(a). *See* NDAA, § 1083(a).

Insofar as it provides a basis for jurisdiction, Section 1605A(a) is largely consonant with former Section 1605(a)(7). But as a result of the veto, the enacted version of the NDAA contained a new provision, Section 1083(d)(1), authorizing the President to "waive any provision of [Section 1083] with respect to Iraq, insofar as that provision may, in the President's determination, affect Iraq or any agency or instrumentality thereof." NDAA, § 1083(d)(1).

To issue such a waiver, the President must determine that it is "in the national security interest of the United States," that it would "promote the reconstruction of, the consolidation of democracy in, and the relations of the United States with, Iraq," and that "Iraq continues to be a reliable ally of the

United States and partner in combating acts of international terrorism." *Id.* Congress provided that the waiver will apply to pre-enactment conduct and regardless of the extent to which it affects pending cases. *Id.* § 1083(d)(2). Section 1083(d)(4) also states the "sense of Congress" that the President "should work with the Government of Iraq on a state-to-state basis to ensure compensation for any meritorious claims based on terrorist acts committed by the Saddam Hussein regime" that "cannot be addressed in courts in the United States due to the exercise of the waiver authority." *Id.* § 1083(d)(4).

On January 28, 2008, the President signed the NDAA into law and then exercised his authority to waive "all provisions of section 1083 of the Act with respect to Iraq and any agency or instrumentality thereof." Presidential Determination No. 2008-9, 73 Fed. Reg. 6571 (2008) (JA422). This waiver necessarily included the entirety of 28 U.S.C. § 1605A, which was added by Section 1083(a).

The President made all the determinations required by Section 1083(d)(1). He also determined that Section 1083 may adversely affect Iraq "by exposing Iraq or its agencies or instrumentalities to liability in United States courts and by entangling their assets in litigation." *Id.* The President concluded that "[s]uch burdens would undermine the national security and foreign policy interests of the United States, including by weakening the ability of the democratically-elected government of Iraq to use Iraqi funds to promote political and economic progress and further develop its security forces." JA425.

These burdens, in the President's view, included "a potentially devastating impact on Iraq's ability to use Iraqi funds to expand and equip the Iraqi Secur-

ity Forces, which would have serious implications for U.S. troops in the field * * * and would harm anti-terrorism and counter-insurgency efforts." JA426. The President also determined that applying Section 1083 to Iraq "*will hurt the interests of the United States by unacceptably interfering with political and economic progress in Iraq that is critically important to bringing U.S. troops home*," and "would redirect financial resources from the continued reconstruction of Iraq and would harm Iraq's stability, contrary to the interests of the United States." JA426-27 (emphasis added). He further concluded that "[t]he economic security and successful reconstruction of Iraq continue to be top national security priorities of the United States" and that Section 1083 "threatens those key priorities." JA422.

Following the waiver, the D.C. Circuit *sua sponte* directed the *Simon/Seyam* parties to submit simultaneous 15-page briefs addressing the jurisdictional effect, if any, of the NDAA and the waiver. JA315. Iraq contended that these actions confirmed the lack of subject matter jurisdiction because the NDAA (1) repealed the jurisdictional basis for the cases—former Section 1605(a)(7)—and (2) replaced it with a new jurisdictional provision—28 U.S.C. § 1605A(a)—application of which the President waived as to Iraq pursuant to express statutory authority.[5] The court allowed no responsive briefing, and held no argument on this issue.

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[5] Iraq also alternatively raised the EWSAA issue, as it had in its earlier brief. *See* Br. of Appellee in Response to Court's Order of Feb. 4, 2008 at 7 n.3, *Simon* v. *Republic of Iraq*, No. 06-7175 (D.C. Cir. filed Mar. 14, 2008); Br. of Defendants-Appellees at 51-53 (D.C. Cir. filed June 18, 2007).

On June 24, 2008, the D.C. Circuit decided the *Simon / Seyam* appeal. It held that subject matter jurisdiction existed, because former Section 1605(a)(7), even though repealed and replaced, still governs pending cases against Iraq, JA320-30, and because the binding *Acree* decision had held that the President did not validly waive that provision. JA335 n.*. The court then reversed the statute-of-limitations dismissals, and rejected Iraq's contention that adjudication of plaintiffs' claims would present non-justiciable political questions. JA330-37.

This Court has granted certiorari to review the D.C. Circuit's judgments in *Beaty* and *Simon / Seyam*. The petitions present the same question: whether Iraq's sovereign immunity has been restored in cases predicated on former Section 1605(a)(7). That question should be answered in the affirmative, and the judgments below reversed.

SUMMARY OF THE ARGUMENT

Under the governing statute, 28 U.S.C. § 1330(a), continuing subject matter jurisdiction exists in these cases only if Iraq is subject to an applicable statutory exception to its foreign sovereign immunity. The only asserted or arguable basis for abrogation of Iraq's immunity, and thus for subject matter jurisdiction, in these cases was former Section 1605(a)(7). But that statute is inapplicable for two reasons.

First, Section 1503 of the EWSAA authorized the President to "make inapplicable with respect to Iraq * * * *any* * * * provision of law that applies to countries that have supported terrorism." EWSAA § 1503 (emphasis added). Implementing important foreign policy judgments, the President exercised the full extent of that authority, which included making

former Section 1605(a)(7) inapplicable to Iraq. The plain language of the EWSAA easily encompasses former Section 1605(a)(7), which was a sanction that applied *only* to countries that supported terrorism. Congress authorized the President to make "any" such laws inapplicable to Iraq, and this Court has repeatedly held that the broad term "any" means what it says.

Contrary to the lower court's holding, there is no basis for limiting EWSAA § 1503 to encompass only a narrow subset of laws. Section 1605(a)(7) was one of many sanctions levied against state sponsors of terrorism, and Congress authorized the President to make all of them, without limitation, inapplicable to Iraq. In construing garden-variety statutes, this Court has consistently upheld plain statutory language when Congress used nearly identical wording to the broad provision at issue here. The case for enforcing that plain language is even stronger here, given that the statute addresses foreign relations, where deference to, and broad grants of, Presidential authority are the norm. Nor does the temporal scope of former Section 1605(a)(7) support a limitation on the President's EWSAA authority. That authority plainly allowed him to make Section 1605(a)(7) immediately and permanently inapplicable to Iraq, and reflected the dramatic shift in U.S. foreign policy from penalizing to supporting Iraq.

Second, regardless of whether the President made former Section 1605(a)(7) inapplicable in 2003, the enactment of the NDAA in 2008 accomplished the same result. In that statute, Congress expressly *repealed* Section 1605(a)(7) and replaced it with a new jurisdictional exception to immunity—Section 1605A—that the President promptly waived as to

Iraq pursuant to express statutory authority. Accordingly, for this reason as well, there is no longer any extant statutory exception to immunity applicable to these cases and no jurisdiction under the plain language of 28 U.S.C. § 1330(a).

The repeal of Section 1605(a)(7) is subject to the usual rule that jurisdictional repeals apply to pending cases—a rule that has particular application to foreign sovereign immunity, which has always reflected current relations among nations. Congress did not merely repeal the statute. Rather, it simultaneously replaced Section 1605(a)(7) with a new provision that encompasses all pending claims—subject only to re-filing rules and the waiver authority as to Iraq, which Congress expressly made applicable to pending cases. And nothing in the NDAA expresses any intent to qualify the unqualified repeal of Section 1605(a)(7). To the contrary, every provision relied on by the court below is fully consistent with Congress's expressed intent to have new Section 1605A—subject to the President's waiver authority as to Iraq—be the sole basis for jurisdiction against foreign sovereigns based on a state-sponsor-of-terrorism designation.

Finally, the legal issues in this case cannot be divorced from their foreign policy context. Foreign sovereign immunity has always reflected *current* relations between nations, and rests on fundamental notions of reciprocity and comity. Acting with statutory authority, the President twice determined that, in light of the overthrow of the prior regime, Iraq should no longer be treated as an outlaw nation but instead should be accorded the same sovereignty in U.S. courts as other U.S. allies. Those determinations effectuate U.S. foreign policy of supporting,

rather than penalizing, the new government of Iraq, which is now a U.S. ally in the fight against terrorism rather than a sponsor of it. They are also critical to the relations between the nations, since how Iraq is treated in U.S. courts bears on how the United States might be treated in Iraqi courts.

The clear mandates of the governing statutes should not be overridden so as to threaten the Executive's ability to implement these crucial foreign policy and diplomatic objectives. These claims should be addressed as claims against friendly allies based on the actions of hostile former regimes have always been addressed in the past—through diplomatic channels rather than by subjecting sovereign allied nations to coercive lawsuits in each other's courts.

Accordingly, whether this case is analyzed under the EWSAA or the NDAA, the result is the same: the question presented should be answered in the affirmative and the judgments below reversed with instructions to dismiss the complaints for lack of subject matter jurisdiction.

ARGUMENT

In pertinent part, the FSIA confers federal jurisdiction over actions against a foreign state "as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity * * * under sections 1605–1607 of this title * * *." 28 U.S.C. § 1330(a). Thus, the FSIA is "the sole basis for obtaining jurisdiction over a foreign state" and "subject-matter jurisdiction in any [FSIA] action depends on the existence of one of the specified exceptions to foreign sovereign immunity." *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-35, 439 (1989).

The only asserted or arguable basis for abrogating Iraq's sovereign immunity in these cases—and thus statutory subject matter jurisdiction—was former Section 1605(a)(7). JA162, JA172, JA181. The President, however, made former Section 1605(a)(7) inapplicable to Iraq pursuant to authority the EWSAA expressly granted him, and, in any event, Congress later repealed that statute in the NDAA. "Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868). Accordingly, because there is no longer any basis for jurisdiction in these cases, they must be dismissed.

I. THE PRESIDENT'S EWSAA DETERMINATION MADE FORMER SECTION 1605(A)(7) INAPPLICABLE TO IRAQ.

A. The Plain Language Of The EWSAA Authorized The President To Make Section 1605(a)(7) Inapplicable To Iraq.

"[I]n any case of statutory construction, [the] analysis begins with 'the language of the statute.' And where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999) (citation omitted). "A statute can be unambiguous without addressing every interpretive theory offered by a party. It need only be 'plain to anyone reading the Act' that the statute encompasses the conduct at issue." *Salinas* v. *United States*, 522 U.S. 52, 60 (1997) (citation omitted).

EWSAA § 1503 states that "the President may make inapplicable with respect to Iraq section 620A

of the Foreign Assistance Act of 1961 *or any other provision of law* that applies to countries that have supported terrorism." EWSAA § 1503 (emphasis added). In 2003, the President exercised the full extent of this authority which, as he confirmed, included making former Section 1605(a)(7) inapplicable to Iraq. JA396, JA398, JA402. That should be the end of these cases. The plain text of the statute unambiguously authorized the President to make former Section 1605(a)(7) inapplicable to Iraq, and he did so. Congress used the expansive word "any" to modify "other provision of law that applies to countries that have supported terrorism." EWSAA § 1503. That plainly covers former Section 1605(a)(7), which applied *only* to such countries. *See* 28 U.S.C. § 1605(a)(7)(A) (2000) (repealed) (immunity waived unless "the foreign state was not designated as a state sponsor of terrorism" at the time of, or as a result of, the underlying acts).

On several occasions, this Court has construed similar statutory language and determined that it is unambiguously broad. "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (quoting Webster's Third New International Dictionary 97 (1976)). Thus, in *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 588 (1980), the Court construed a jurisdictional grant providing for review of certain enumerated agency final actions "or any other final action of the Administrator under this Act." One party claimed that "any other final action" should be construed narrowly to mean "only those similar to the actions under the specifically enumerated provisions that precede that catchall phrase." *Id.* at 587. The Court

rejected that claim because the phrase "any other final action" was "expansive" and "offer[ed] no indication whatever that Congress intended the limiting construction * * *." *Id.* at 589.

Recently, this Court reached the same conclusion in *Ali* v. *Fed. Bureau of Prisons*, 128 S. Ct. 831 (2008), which involved a statute that exempted from a waiver of sovereign immunity claims involving, *inter alia*, detention of property "by any officer of customs or excise *or any other* law enforcement officer." 28 U.S.C. § 2680(c) (emphasis added). Noting that the "[t]he phrase '*any* other law enforcement officer' suggests a broad meaning," *Ali*, 128 S. Ct. at 835 (emphasis in original), the Court rejected the argument that the preceding phrase narrowed the statute's scope. *Id.* at 839. The *ejusdem generis* doctrine—which interprets general terms in accord with preceding specific ones—did not apply because "[t]he phrase [was] disjunctive, with one specific and one general category." *Id.* Without more listed items to compare it to, "no relevant common attribute immediately appear[ed] from the phrase 'officer of customs or excise.'" *Id.* Nor could the *noscitur a sociis* doctrine—which interprets a word by the company it keeps—create an ambiguity where none existed, because "nothing in the overall statutory context suggest[ed] that customs and excise officers were the exclusive focus of the provision." *Id.* at 840.

The case for giving the broad term "any" its plain meaning is even stronger here, given that nothing in the EWSAA narrows Section 1503's broad grant of foreign-policy authority to the President. Nevertheless, in *Acree*, the D.C. Circuit relied heavily on the *ejusdem* and *noscitur* canons to narrowly interpret

the words "*any* other provision of law" to mean only those provisions that "call for economic sanctions and prohibit grants of assistance to state sponsors of terrorism." 370 F.3d at 54. But as in *Harrison* and *Ali*, those canons only apply if the surrounding words provide "a common feature to extrapolate." *S.D. Warren Co.* v. *Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 380 (2006). The words surrounding Section 1503's grant of authority give no common feature from which to extrapolate a restriction, except the requirement that the laws made inapplicable be ones that "appl[y] to countries that have supported terrorism." That perfectly describes former Section 1605(a)(7).[6]

The preceding phrase in Section 1503—which refers to section 620A of the Foreign Assistance Act of 1961 ("FAA")—does not provide a common limiting feature. It is not a list from which a common characteristic can be identified, but rather a single example of a law the President may make inapplicable. *See Ali*, 128 S. Ct. at 839 ("[t]he absence of a list of specific items undercuts the inference embodied in *ejusdem generis* that Congress remained focused on the common attribute when it used the catchall phrase"). And one cannot "assume that pairing a broad statutory term with a narrow one shrinks the broad one." *S.D. Warren*, 547 U.S. at

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[6] It also describes many other sanctions against state sponsors of terrorism that do not meet the D.C. Circuit's narrow construction of the EWSAA. *See, e.g.*, 8 U.S.C. § 1735 (restricting visas); 15 U.S.C. § 57b-2(b)(6)(D) (restricting cooperation with foreign law enforcement); 15 U.S.C. § 7410(b) (restricting grants and fellowships to individual Iraqis); 22 U.S.C. § 4305(d) (restricting foreign mission property acquisition); 26 U.S.C. 901(j)(2)(A)(iv) (denial of foreign tax credits).

379. "[G]iving one example does not convert express inclusion into restrictive equation." *Id.*

Nor do the surrounding provisos turn Section 1503's broad grant of authority into a narrow one. Section 1503 begins by stating that "[t]he President may suspend the application of any provision of the Iraq Sanctions Act of 1990" and follows with eight disjointed provisos, the second of which is at issue here. But the President's authority to make laws inapplicable to Iraq is not narrowed by its appearance in a proviso. Provisos sometimes refer back to the preceding clause, but "it is also possible to use a proviso to state a general, independent rule." *Alaska* v. *United States*, 545 U.S. 75, 106 (2005). *See also Am. Express Co.* v. *United States*, 212 U.S. 522, 534 (1909) ("a proviso has not infrequently been the means of introducing into a law independent legislation").

The proviso at issue here is such an independent rule. Far from tying the President's authority to the Iraq Sanctions Act ("ISA"), the second proviso refers to a *different* law—FAA § 620A—as well as "any" other law applying to state sponsors of terrorism. All four of the other substantive provisos in EWSAA § 1503 are similarly divorced from the President's authority to suspend the ISA.[7] The fourth expressly declares FAA § 307 inapplicable to Iraq, and the fifth ends restrictions on U.S. voting in international bodies for resolutions or programs providing assistance to Iraq. Like the second proviso, neither is linked to the ISA. Indeed, FAA § 307 was not

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[7] Section 1503 has eight provisos, but the sixth, seventh, and eighth relate only to reporting requirements and the expiration of the President's authorities.

enacted until after the ISA. *See* Foreign Relations Authorization Act, Fiscal Year 1994-95, Pub. L. No. 103-236, § 431(a)(1), 108 Stat. 459 (1994). And while the first and third provisos limit the President's powers under "this section" (*i.e.*, EWSAA § 1503) neither is specifically tied to the section's first clause relating to the ISA.

According to the *Acree* majority, 370 F.3d at 54, the second proviso must refer *sub silentio* to Section 586F(c) of the ISA, which broadly mandated enforcement against Iraq of five enumerated sanctions "and all other provisions of law that impose sanctions against a country which has repeatedly provided support for acts of international terrorism." ISA § 586F(c), 104 Stat. 2051. But the EWSAA does not refer to ISA § 586F(c) or contain the same enumerated list of sanctions. And the operative language of the two provisions is different. Whereas ISA § 586F(c) refers broadly to all other "sanctions" laws, EWSAA § 1503 refers to all other laws that "apply" to state sponsors of terrorism. Thus, while former Section 1605(a)(7)—which exposed Iraq to lawsuits and judgments that cannot be brought or imposed against other nations—was a form of sanction, the language of EWSAA § 1503 is even broader than that of ISA § 586F(c).

In any event, when the ISA expressly mandated enforcement against Iraq of "*all* other provisions of law" imposing sanctions on state sponsors of terrorism, there is no basis to conclude that Congress intended to exempt some of those provisions. The obvious purpose of ISA § 586F was to codify the President's earlier determination that Iraq was a state sponsor of terrorism, *see* 55 Fed. Reg. 37,793 (1990), and apply to Iraq all laws that attach to that

designation. Such laws necessarily included anything triggered by such a designation, like former Section 1605(a)(7). Thus, even if the President's EWSAA authority were tied to the broad set of laws referenced in ISA § 586F(c)—and it was not—former Section 1605(a)(7) is included.

When Congress wants to specify a subset of the laws applying to state sponsors of terrorism, it knows how to do so. Just two months before enacting the EWSAA, Congress enacted the Consolidated Appropriations Resolution of 2003. That law provided that exemptions from certain restrictions on assistance to nongovernmental organizations would not apply "with respect to section 620A of the Foreign Assistance Act of 1961 or any *comparable provision of law prohibiting assistance* to countries that support international terrorism." Pub. L. No. 108-7, § 537(c)(1), 117 Stat. 196 (2003) (emphasis added). Thus, "Congress knows how to use more limited language along the lines of the [*Acree*] majority's construction when it wants to." *Acree*, 370 F.3d at 60 (Roberts, J., concurring).

Federal courts "are not at liberty to rewrite [a] statute to reflect a meaning [they] deem more desirable. Instead, [they] must give effect to the text Congress enacted." *Ali*, 128 S. Ct. at 841. *See also McNeil* v. *United States*, 508 U.S. 106, 111 (1993). Yet that is what the D.C. Circuit did with the EWSAA. It effectively rewrote the broad language "*any* other provision of law" to say "those provisions of law that constitute legal restrictions on assistance to and trade with Iraq." *Acree*, 370 F.3d at 56. That interpretation was manifestly erroneous.

B. The EWSAA's History And Context Confirm Its Plain Language.

Because the statute is unambiguous, there is no cause to look to legislative history. *Gonzales*, 520 U.S at 6 ("[g]iven [a] straightforward statutory command, there is no reason to resort to legislative history"). The EWSAA's history, however, confirms that the statute's scope was intentionally made broad.

In proposing the EWSAA, the White House initially asked for the power to make inapplicable, as to Iraq, FAA § 620A "or other provision of law that applies to countries that have supported terrorism." 08-539 Opp. Cert. 22a. The Senate bill adopted that request word-for-word. S. 762, § 503, 108th Cong. (2003). But the House bill authorized the President to make inapplicable "*any* other provision of law that applies to countries that have supported terrorism." H.R. 1559, § 1402, 108th Cong. (2003) (emphasis added). This version became law. Thus, by inserting the word "any," Congress deliberately expressed its intent to give the provision an unambiguously "expansive meaning." *Gonzales*, 520 U.S. at 5.

The D.C. Circuit concluded that the legislative history of the EWSAA is "sparse" and "not conclusive." *Acree*, 370 F.3d at 55, 56. It then relied on the *absence* of any history specifically referring to former Section 1605(a)(7) or federal court jurisdiction to support its narrowing of Section 1503's broad grant of authority. *Id.* at 56. The absence of such legislative history is no basis to override the broad language that Congress actually used. *See Brogan* v. *United States*, 522 U.S. 398, 403 (1998) ("it is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy"); *Pa. Dep't of Corr.* v.

Yeskey, 524 U.S. 206, 212 (1998) ("[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.") (citations and quotations omitted).

The breadth of Section 1503 is unsurprising given that the statute implicates foreign policy, where "Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act." *Dames & Moore* v. *Regan*, 453 U.S. 654, 678 (1981). As this Court has held,

> [p]ractically every volume of the United States Statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs.

United States v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). Because the President "has the better opportunity of knowing the conditions which prevail in foreign countries, * * * especially * * * in time of war," the Court has acknowledged the "unwisdom of requiring Congress in this field * * * to lay down narrowly definite standards by which the President is to be governed." *Id.* at 320-22.

In the EWSAA, Congress delegated to the President the delicate foreign policy judgments regarding whether and when a new government of Iraq would be freed from the sanctions imposed on its predecessor regime. Following the regime's ouster,

the President made the determination—expressly authorized by the EWSAA—that Iraq would henceforth be treated like other democratic allies, including in the restoration of its fundamental sovereign immunity. "[T]his Court consistently has deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities." *Verlinden*, 461 U.S. at 486. Even the *Acree* majority found the President's interpretation of Section 1503 "plausible" because "§ 1605(a)(7) arguably poses a threat of a sort to American reconstruction efforts in Iraq." 370 F.3d at 57. Thus, even if EWSAA § 1503 were ambiguous—and it is not—there would be no basis to countermand the President's reasonable foreign-policy determination. *See Dep't of the Navy* v. *Egan*, 484 U.S. 518, 530 (1988) ("[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.").

Indeed, the President has independent constitutional authority—even *without* express statutory authorization—to compromise the claims of U.S. nationals to further foreign policy interests. *See Am. Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 415 (2003) ("'[t]hat the President's control of foreign relations includes the settlement of claims is indisputable'") (citation omitted); *Dames & Moore*, 453 U.S. at 679-80 (President possesses Article II authority to settle or compromise pending claims in exercise of foreign policy). Since the President could have wholly eliminated these claims based on his own foreign affairs power, the EWSAA's express, broad statutory authorization should not be construed to have denied him

the lesser power to make an exception to sovereign immunity inapplicable while still preserving claims for diplomatic negotiation.

Contrary to the *Acree* majority's reasoning, 370 F.3d at 56, the plain language of the EWSAA cannot be overridden based on "comparison of the temporal scope of 28 U.S.C. § 1605(a)(7) with that of § 1503." Section 1503's temporal scope is clear. Congress authorized the President to "make inapplicable" as to Iraq—immediately and permanently upon his determination—all laws applying to state sponsors of terrorism. Because statutory subject matter jurisdiction must exist at all stages of a case, *see McCardle*, 74 U.S. (7 Wall.) at 514, the inapplicability of Section 1605(a)(7) necessarily meant that there was no longer any jurisdictional basis for these cases. Any other conclusion would mean that Section 1605(a)(7) is still "applicable" to Iraq, which would be contrary to the determination that Congress authorized the President to make.

The D.C. Circuit wrongly thought this result "perplexing" because Section 1605(a)(7)'s abrogation of immunity continued, as to other nations, for claims based on prior acts even if the terrorism-sponsor designation was later removed. *Acree*, 370 F.3d at 56. The EWSAA, and the President's determination, addressed a situation not expressly contemplated when Section 1605(a)(7) was enacted: the overthrow of a terrorism-sponsoring regime by U.S. military force and the establishment of a new, democratic, and allied government. Almost overnight, Iraq went from being an outlaw sponsor of terrorism to a crucial U.S. ally in the fight against that terrorism. Recognizing that new reality, Congress "made an *ad hoc* decision to strike a

different balance in favor of the new government of Iraq. The whole point of Section 1503 was to change existing rules to respond to new realities; it is not a compelling argument against a construction of the section to object that it would do just that." *Id.* at 61 (Roberts, J., concurring).

The foreign policy as to Iraq embodied in Section 1503 thus differs from U.S. policy as to other former state sponsors of terrorism. For example, although Libya has been removed from that list, it is far from a friendly U.S. ally. Equally important, the government that sponsored the terrorism—the Khaddafi regime—is still in power. Thus, when the Executive de-listed Libya, it made clear that this action was subject to "a confirmation from Libya" that Libya would have to respond to the legal cases against it. 71 Fed. Reg. 31,909 (2006). *See also* Libyan Claims Resolution Act, Pub. L. No. 110-301, 122 Stat. 3000 (2008); 73 Fed. Reg. 63,540 (2008) (rescinding North Korea's designation while hostile regime still in power). By contrast, these cases against Iraq seek to penalize a new, democratic, and allied government that the United States is actively supporting.

Nor is the restoration of Iraq's sovereign immunity "bizarre" in light of the EWSAA's sunset provision. *Acree*, 370 F.3d at 56-57. The D.C. Circuit misread that provision, which was never briefed in *Acree*. The provision states that the "*authorities* contained in this section shall expire" if not renewed. EWSAA § 1503 (emphasis added). *See* Pub. L. No. 108-106, § 2204(2), 117 Stat. 1230 (2003) (extending authorities until September 30, 2005). It did not provide that the *effect* of the President's actions would expire where, as here, the actions were taken while the statutory authority was in effect.

Such an interpretation would be nonsensical. For example, Section 1503 authorized the President to suspend the ISA, which legislatively designated Iraq as a state sponsor of terrorism and imposed its own sanctions. *See* ISA, §§ 586C, 586F(c). If the effect of that suspension expired with the President's EWSAA's authorities, Iraq would have been re-subjected to onerous statutory sanctions even though its terrorism-sponsor designation was administratively lifted. Exercising valid and extant authority, the President permanently made former Section 1605(a)(7) inapplicable to Iraq. *See also* H.R. Conf. Rep. No. 108-337 at 59 (2003) (noting, in connection with extension of EWSAA authorities, that Presidential Determination 2003-23 had made laws "permanently inapplicable to Iraq").

But even under the *Acree* majority's flawed interpretation that Section 1503 covers only laws "that impose economic sanctions on Iraq or that present legal obstacles to the provision of assistance to the Iraqi Government," 370 F.3d at 55, the President's determination still restored Iraq's sovereign immunity. Former Section 1605(a)(7), which authorized costly lawsuits and potentially massive judgments against Iraq based on its status as a terrorism sponsor, was in fact an "economic sanction[] on Iraq," *id.*, and the President determined in his foreign-policy judgment that the statute presented legal obstacles to assisting the Iraqi Government, *see supra* at 6-8.

C. NDAA Section 1083(c)(4) Does Not Affect The President's EWSAA Determination.

NDAA § 1083(c)(4)—an eleventh-hour conference amendment attached without debate to the pre-veto bill—purports to state the intent of the earlier

Congress that enacted the EWSAA. *See* NDAA § 1083(c)(4) ("[n]othing in section 1503 of [the EWSAA] has ever authorized, directly or indirectly, the making inapplicable of any provision of chapter 97 of title 28, United States Code, or the removal of the jurisdiction of any court of the United States"). That provision has no effect on this case for two reasons.

First, Section 1083(c)(4) is an ineffective, after-the-fact effort to manufacture "history" for an expired law. Section 1083(c)(4) is not itself a substantive provision: it does not authorize or prohibit anything, it does not amend or reenact the EWSAA (which had long since expired) or any other law, and it does not purport to rescind the determination the President had made years before. As such, it cannot displace the traditional canons of statutory interpretation in construing the earlier EWSAA authority under which the President had previously acted. An attempt by later legislators to ascribe intent to a previous, differently-constituted Congress cannot override the plain language of the statute as an expression of the intent of the Congress that passed it.

"[P]ostenactment views 'form a hazardous basis for inferring the intent' behind a statute; instead, Congress' intent is 'best determined by [looking to] the statutory language that it chooses.'" *United States* v. *Monsanto*, 491 U.S. 600, 610 (1989) (citations omitted). This is true, moreover, even where the attempt at subsequent history is codified. *See Rainwater* v. *United States*, 356 U.S. 590, 593 (1958) ("At most, the 1918 amendment is merely an expression of how the 1918 Congress interpreted a statute passed by another Congress more than a half century before. Under these circumstances such interpretation has very little, if any, significance.");

Mackey v. *Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 839-40 (1988) ("the opinion of this later Congress as to the meaning of a law enacted 10 years earlier does not control the issue").[8]

The oxymoronic nature of "subsequent legislative history" is particularly evident here, where the President properly and effectively exercised his EWSAA authority while it was in effect, but that authority expired long before the NDAA. *See Sullivan* v. *Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring) ("Arguments based on subsequent legislative history, like arguments based on antecedent futurity, should not be taken seriously * * *."). In these circumstances, any attempt by later legislators to hypothesize the intent of the earlier authorization is of no moment. Where a legislature purports in a new law to declare the construction of prior law as applied to past events,

> [c]ourts will treat such laws with all the respect that is due to them as an expression of the opinion of individual members of the legislature as to what the rule of law previously was. But beyond that they can have no binding effect; and if the judge is satisfied the legislative construction is wrong, he is bound to disregard it.

Koshkonong v. *Burton*, 104 U.S. (14 Otto) 668, 678 (1881). The President's exercise of his statutory authority should be judged based on the unambiguous words of the statute before him when

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[8] *See also South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 354-55 (1998); *Haynes* v. *United States*, 390 U.S. 85, 87 n.4 (1968) ("[t]he view of a subsequent Congress of course provide[s] no controlling basis from which to infer the purposes of an earlier Congress").

he acted, not by an after-the-fact, unsuccessful attempt to manufacture "history."

Second, even if Section 1083(c)(4) could otherwise have had an effect on Iraq's rights in this case, its application was waived by the President under authority expressly granted him in the NDAA. The President did not acquiesce in this clumsy attempt to cast doubt on his prior exercise of foreign policy authority. Rather, he vetoed the original bill and refused to sign any replacement until he was given the authority to waive any and all provisions of Section 1083—necessarily including Section 1083(c)(4)—to the extent they may affect Iraq. *See* NDAA § 1083(d). The President did just that, waiving *all* then-operative provisions of Section 1083 as to Iraq. For this reason as well, Section 1083(c)(4) has no effect on Iraq in this case.

* * *

For these reasons, the President properly exercised his EWSAA authority to make former Section 1605(a)(7) inapplicable to Iraq. As a result, there is no continuing subject matter jurisdiction in these cases.

II. THE NDAA'S REPEAL OF FORMER SECTION 1605(A)(7), AND THE PRESIDENT'S WAIVER OF ITS REPLACEMENT, HAVE ELIMINATED ANY CLAIMED BASIS FOR SUBJECT MATTER JURISDICTION.

Because the President's EWSAA determination restored Iraq's sovereign immunity in 2003, there is no need to consider whether the enactment of the NDAA and subsequent waiver accomplished the same result in 2008. Nevertheless, in the event the

EWSAA determination is not dispositive, the NDAA and waiver are an independent reason to answer the question presented in the affirmative and reverse the judgments below. Regardless of whether the President effectively made Section 1605(a)(7) inapplicable to Iraq in 2003, the NDAA expressly *repealed* that statute and the President then waived its replacement as to Iraq. The result is the same: there is no extant exception to sovereign immunity applicable to these cases, and therefore no basis for continuing subject matter jurisdiction.

A. There Is No Jurisdiction Under The Plain Language Of The Governing Statutes.

Under 28 U.S.C. § 1330(a) ("Section 1330(a)"), FSIA jurisdiction exists only as to claims "with respect to which the foreign state is not entitled to immunity * * * *under sections 1605–1607 of this title* * * *." 28 U.S.C. § 1330(a) (emphasis added). Thus, jurisdiction depends on whether there is *currently* an applicable exception to immunity in sections 1605-1607 of title 28 of the U.S. Code. Section 1605(a)(7) has been repealed and no longer exists in the U.S. Code.[9] And its replacement, Section 1605A, has been waived as to Iraq. Accordingly, under the plain language of Section 1330(a), there is no longer any statutory subject matter jurisdiction in these cases. *See Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) ("[f]ederal courts are courts of limited jurisdiction" and "possess only that power

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[9] *See* NDAA, § 1083(b)(1)(A)(iii) ("Section 1605 of title 28, United States Code, is amended * * * in subsection (a) * * * by striking paragraph (7)"); *see also House Legislative Counsel's Manual on Drafting Style*, HLC 104-1, 104th Cong., 1st Sess. § 334, at 46 (1995) ("a repeal and a strike carry the same legal significance").

authorized by Constitution and statute"); *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) ("Federal courts * * * have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto").

In *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004), this Court held that newly enacted exceptions to immunity in the FSIA apply to cases based on prior acts. The Court relied on the principle that "such immunity reflects current political realities and relationships, and aims to give foreign states and their instrumentalities some *present* 'protection from the inconvenience of suit as a gesture of comity.'" *Id.* at 696 (emphasis in original; citation omitted). Applying that principle, the Court "defer[red] to the most recent * * * decision" of the political branches on immunity. *Id.* FSIA jurisdiction thus depends on currently-codified exceptions to immunity, which no longer include former Section 1605(a)(7).

This result comports with the longstanding default rule that "when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law." *Bruner* v. *United States*, 343 U.S. 112, 116-17 (1952). *See also The Assessors* v. *Osbornes*, 76 U.S. (9 Wall.) 567, 575 (1869) ("Jurisdiction * * * was conferred by an Act of Congress, and when that Act of Congress was repealed the Power to exercise such jurisdiction was withdrawn, and inasmuch as the repealing act contained no saving clause, all pending actions fell, as the jurisdiction depended entirely upon the Act of Congress.").

The same basic principles apply here, where Congress has repealed an exception to immunity and

immediately replaced it with a new provision that covers all pending cases. Just as newly-enacted exceptions to foreign sovereign immunity apply to cases based on prior events, so too should the newly-enacted Section 1605A(a) govern current cases—subject to the President's waiver authority and waiver as to Iraq.

B. Nothing In Section 1083 Limits The Repeal Of Section 1605(a)(7).

It is possible, of course, for Congress to express a contrary legislative intent. For example, in *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 576-77 (2006), the Court held that Congress did not intend for the limited divestment of habeas jurisdiction in the Detainee Treatment Act ("DTA") to apply to pending cases because the statute expressly provided that two accompanying jurisdictional provisions applied to pending cases, thus demonstrating a different intent with respect to the third.

Congress expressed no such intent to preserve Section 1605(a)(7) for these cases. No provisions of NDAA § 1083 were made selectively inapplicable to pending cases. To the contrary, Congress expressly provided that title 28 of the U.S. Code—on which Section 1330(a) jurisdiction depends—now contains Section 1605A but not Section 1605(a)(7). There is only a single U.S. Code, and it now has no Section 1605(a)(7) in it. Thus, unlike *Hamdan*, where the non-application of the DTA's prohibition on exercising habeas jurisdiction still left the unrepealed general habeas statute as a jurisdictional basis, there is no existing statutory provision conferring jurisdiction over these cases.

The NDAA is a prototypical instance in which a jurisdictional repealer applies to pending cases. Where Congress "'takes away no substantive right but simply changes the tribunal that is to hear the case,'" it is generally understood that Congress intends the repealer to apply to all pending cases. *Hamdan*, 548 U.S. at 577 (citation omitted). In the NDAA, Congress did not simply repeal Section 1605(a)(7) but simultaneously *replaced* it with a new jurisdictional provision that covers *every* pending Section 1605(a)(7) case. Subject to transitional refiling requirements, a plaintiff in a pending Section 1605(a)(7) case may bring its claims under new Section 1605A, without regard to defenses of res judicata, collateral estoppel, or limitations.[10] Indeed, Congress did not even change the forum for such actions, and it significantly *expanded* the plaintiffs' rights. *See, e.g.*, 28 U.S.C. § 1605A(b) (new limitations period), *id.* § 1605A(c) (new private right of action including punitive damages); *id.* § 1605A(g) (lis pendens).

To be sure, the *President's* subsequent waiver of Section 1605A's application to Iraq confirmed Iraq's immunity in these cases by eliminating that statute's applicability as to Iraq. But Congress unambiguously provided that this waiver would apply to pending cases. *See* NDAA § 1083(d)(2) (waiver applies to prior conduct and "regardless of whether, or the extent to which, [the waiver] affects any action filed before, on, or after the date of [the waiver] or of the

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[10] *See* 28 U.S.C. § 1605A(a)(2)(A)(ii); NDAA § 1083(c)(3) (authorizing Section 1605A action "arising out of the same act or incident" as pending Section 1605(a)(7) action); *id.* § 1083(b)(2)(A), (B) (authorizing motions to convert certain actions and waiving defenses).

enactment of this Act"). Thus, the question is whether *Congress's* repeal of Section 1605(a)(7)—which applied to all nations covered by that provision, not just Iraq—is subject to the usual rule that jurisdictional repealers apply to pending cases. It is. Far from leaving Section 1605(a)(7) plaintiffs with no forum as a result of that repeal, Congress simultaneously enacted a replacement provision that encompasses all pending claims (and also creates new procedural and substantive rights for plaintiffs).[11]

Other provisions of Section 1083 confirm that fact. Congress amended the main attachment provisions of the FSIA to replace Section 1605(a)(7) with Section 1605A so that the new immunity exception governs attachments for all judgments. *See* NDAA § 1083(b)(3)(A), (B) (amending 28 U.S.C. §§ 1610(a), (b)). By contrast, Congress amended the special provisions relating to attachments against U.S.-

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[11] Thus, the NDAA's repeal of Section 1605(a)(7) was not "retroactive" as to plaintiffs because it did not "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 280 (1994). To the contrary, the repeal and replacement of Section 1605(a)(7) gave plaintiffs *increased* rights. Nor was the President's waiver as to Iraq (which in any event expressly applies to pending cases) retroactive here. That waiver, like the EWSAA determination before it, simply restored Iraq's immunity to what it was in 1991 and 1995, when the underlying events in these cases occurred. *See Acree*, 370 F.3d at 65 (Roberts, J., concurring) ("At the time of the primary conduct at issue here, the jurisdictional grant of Section 1605(a)(7) did not even exist."). Moreover, the waiver extinguished no claims, only U.S. jurisdiction to hear them. And "[a]ny claim plaintiffs could have brought was in any event always subject to compromise or abrogation by the Executive." *Id.* (citing *Garamendi*, *supra*, and *Dames & Moore*, *supra*).

blocked assets to refer to both Section 1605A *and* Section 1605(a)(7) "as in effect *before* the enactment of section 1605A." *Id.* 1083(b)(3)(C) (amending 28 U.S.C. § 1610(f)) (emphasis added). This confirms both that former Section 1605(a)(7) is no longer "in effect" after the NDAA, and that Congress knew how to make limited ongoing reference to that section when it wanted to. It made no provision, however, for sustaining that section as a basis for ongoing jurisdiction in this or any other case.

Although there is no need to consult legislative history because 28 U.S.C. § 1330(a) is unambiguous that the Court lacks jurisdiction, the NDAA conference report confirms Congress's intent that Section 1605A is now the sole basis for FSIA jurisdiction based on a state-sponsor-of-terrorism designation. The stated purpose of Section 1083 was to "*consolidate* provisions relating to the exception to sovereign immunity for state sponsors of terrorism in a new section 1605A to the FSIA, and *repeal* the previous exception set out in section 1605(a)(7)." H.R. Rep. No. 110-477, at 1000 (2007) (emphases added). Thus, the report specifically confirmed that "[c]laims brought prior to the enactment of [the NDAA] against a foreign state that at the time was designated as a state sponsor of terrorism, or an action related to such a claim, would still be heard *under this section [i.e., Section 1605A]*." *Id.* at 1001 (emphasis added).

Finally, Section 1083(d), a post-veto addition, states the "sense of the Congress" that the Executive should work with Iraq on a "state-to-state basis" to address any meritorious claims that "cannot be addressed in courts in the United States due to the exercise of the waiver authority * * *." NDAA §

1083(d)(4). This confirms Congress's understanding that the President's waiver would in fact result in dismissal of claims against Iraq. Various members of Congress, even those opposed to the waiver, expressed the same understanding in the floor debates on the re-enacted law. *See* 154 Cong. Rec. H257 (Jan. 16, 2008) (waiver is appropriate "because certainly we can't or shouldn't hold the current government of Iraq responsible for things done by its predecessor, Saddam Hussein") (Rep. Saxton); *id.* at S54 (Jan. 22, 2008) (waiver applies to Iraq but "other cases against state sponsors of terrorism, including both Iran and Libya, may proceed to judgment and collection under section 1083") (Sen. Levin); *id.* at S55 (waiver would allegedly "prevent victims of past Iraqi terrorism—for acts committed by Saddam Hussein—from achieving the same justice as victims of other countries.") (Sen. Lautenberg).[12]

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[12] Respondents have previously cited "extended" remarks of one NDAA opponent, which were inserted into the Congressional Record after the fact. See 154 Cong. Rec. E46-47 (Jan. 17, 2008) (Rep. Conyers); *id.* at E1 (extended remarks are not delivered on House floor). Those remarks are of no use in determining the NDAA's meaning. *See Hamdan*, 548 U.S. at 580 n.10 (dismissing statements "inserted into the Congressional Record after the Senate debate"); *Garcia* v. *United States*, 469 U.S. 70, 76 (1984) ("committee reports," not "passing comments of one Member," are "authoritative" legislative history); *Quern* v. *Mandley*, 436 U.S. 725, 736 n.10 (1978) ("post hoc observations by a single member of Congress carry little if any weight"); *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394 (1951) ("fears and doubts of the opposition are no authoritative guide to the construction of legislation").

In any event, Rep. Conyers merely stated his view that a single case—*Acree*—would be "unaffected" by the NDAA waiver because the waiver allegedly "does not affect rights under current law." *See* 154 Cong. Rec. at E46-47 (referring to case brought by 17 soldiers); *Acree*, 370 F.3d at 411 (noting 17

C. The Provisions Relied On By The D.C. Circuit Do Not Overcome Or Undermine The Repeal Of Section 1605(a)(7).

The four NDAA provisions relied on below by the D.C. Circuit do not express any intent to save pending cases from the express repeal of Section 1605(a)(7), much less override the unambiguous language of Section 1330(a).

1. The D.C. Circuit placed great weight on NDAA § 1083(c)(1), which states that "[t]he amendments made by this section shall apply to any claim arising under Section 1605A." NDAA § 1083(c)(1). It reasoned that "a claim pending under former § 1605(a)(7) when the NDAA became law did not 'aris(e) under section 1605A.'" JA325. Thus, according to the court, *nothing* in NDAA § 1083—including its repeal of Section 1605(a)(7)—can ever apply to a pending case. *Id.* ("§ 1083(c)(1) makes clear the 'amendments' apply * * * to no 'pending' claims").

The court erred. Section 1083(c) is entitled "Application to Pending Cases," showing that Congress did not intend for pending cases to be wholly exempt from the NDAA's application. To the contrary, Section 1083(c)(2)(A) applies *only* to pending cases, as it authorizes the filing of a specific motion in cases then-pending when the NDAA was enacted. Yet under the D.C. Circuit's interpretation, that amendment could not apply to the only instance it covers. That is nonsensical. Even if one accepts the court's mistaken interpretation of Section 1083(c)(1) that a claim only "arises under" the law

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plaintiffs). He was essentially right as to *Acree*. The D.C. Circuit had dismissed *Acree* prior to the NDAA, and the waiver did not affect that dismissal.

creating the cause of action, *id.*, pending claims invoking the state-sponsor-of-terrorism exception do in fact arise under Section 1605A because they are cognizable, and may be asserted, under that provision.[13] Inchoate claims "arise under" a body of law regardless of whether they have yet been asserted under it. *Cf. Caterpillar, Inc.* v. *Williams*, 482 U.S. 386, 393 (1987) (completely-preempted state law claim "arises under" federal law "from its inception").

Read correctly, Section 1083(c)(1) provides the opposite of what the D.C. Circuit thought. The NDAA amendments apply to "*any*" claim arising (*i.e.*, cognizable) under Section 1605A, including then-pending ones. This confirms Congress's intent to "*consolidate* provisions relating to the exception to sovereign immunity for state sponsors of terrorism in a new section 1605A." H.R. Rep. No. 110-477, at 1000.

2. The court also relied on NDAA § 1083(c)(3), which allows Section 1605(a)(7) cases to be refiled under Section 1605A within 60 days after the later of the NDAA's enactment or "the date of the entry of judgment in the original action." NDAA § 1083(c)(3). It reasoned that "[t]here would be no reason for the Congress to have tied the 60-day period to the date of 'entry of judgment' in a case pending under § 1605(a)(7) when the NDAA became law if * * * the

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[13] The correct reading is that the NDAA amendments apply to any claims that can be asserted under Section 1605A's immunity exception. *Cf.* 28 U.S.C. § 2254(i) (referring to proceedings "arising under" habeas jurisdictional grant). This includes state and foreign law claims, not just those cognizable under the new cause of action in Section 1605A(c). Otherwise, Section 1083's many plaintiff-friendly amendments would not apply to most claims cognizable under the auspices of Section 1605A.

Act requires the dismissal of all pending cases." JA327-28. That is wrong for two reasons.

First, a final dismissal for lack of jurisdiction is in fact an "entry of judgment." *See Bruner*, 343 U.S. at 113 (district court "entered judgment dismissing petitioner's complaint for want of jurisdiction"). Thus, by allowing re-filing after judgment, Congress protected plaintiffs who may have been unaware of the NDAA's enactment from the draconian result that would otherwise occur if the defendant sought dismissal more than 60 days after that enactment. By contrast, the D.C. Circuit's interpretation—that a Section 1605(a)(7) plaintiff may re-file only after a judgment on the *merits*—is not only atextual but makes no sense, since that is when re-filing will most likely be unnecessary, either because the plaintiff has already lost or has already won.

Second, if an action involves multiple parties or claims, or alternative theories, only some of which are based on former Section 1605(a)(7), there will be no entry of judgment until final adjudication of the other claims (absent Fed. R. Civ. P. 54(b) certification). Thus, in these cases as well, plaintiffs may await a final judgment before re-filing under Section 1605A. Although the D.C. Circuit wrongly believed that such cases are impossible, *see* JA328 n.*, this scenario occurs, at a minimum, whenever a foreign sovereign is sued under both the state-sponsor-of-terrorism exception and another exception, or whenever claims against a foreign sovereign under Section 1605(a)(7) are combined with claims against non-sovereign parties. *See, e.g.*, *Abur* v. *Republic of Sudan*, 437 F. Supp. 2d 166, 169 n.4, 177 (D.D.C. 2006) (noting "presence of non-sovereign defendants in this action" and that Sudan was sued under both

Section 1605(a)(7) and waiver-of-immunity exception in 28 U.S.C. § 1605(a)(1)). In these cases, a plaintiff may proceed to judgment on the other claims before re-filing under Section 1605A.

Therefore, Section 1083(c)(3) is fully consistent with Congress's intent to consolidate all claims under new Section 1605A, and evinces no intent to overcome the normal rule that jurisdictional repealers of this sort apply to pending cases.

3. The D.C. Circuit's reliance on Section 1083(c)(4)—the provision referring to the expired EWSAA—was likewise misplaced. The court held that this provision is "clear" that Congress intended to qualify the repeal of Section 1605(a)(7) for pending cases. JA329. But nothing in Section 1083(c)(4) says that, much less clearly so.

The provision does not even refer specifically to Section 1605(a)(7). Rather, it states that the EWSAA authority does not cover "any provision of chapter 97 of title 28, United States Code [*i.e.*, the entire FSIA], or the removal of the jurisdiction of any court of the United States." NDAA § 1083(c)(4). This language includes not just former Section 1605(a)(7), but also new Section 1605A. It was thus an apparent (albeit unsuccessful) attempt to prevent arguments that the President's EWSAA determination applied to cases originally brought under Section 1605(a)(7) and transferred to Section 1605A.[14] If the drafters had only been concerned about the EWSAA as applied to pending Section 1605(a)(7) cases, they would have referred to such cases specifically rather than broadly referring to the entire FSIA. But at a

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[14] Any such arguments were mooted by the President's waiver of Section 1605A as to Iraq.

minimum, nothing in Section 1083(c)(4)—which was in any event waived to the extent it affects Iraq, *see supra* at 37—remotely qualifies the unqualified repeal of Section 1605(a)(7).

4. The same is true with regard to the waiver authority of NDAA § 1083(d)(1). The D.C. Circuit believed that if Section 1605(a)(7) were repealed as to pending cases "the President could use § 1083(d)(1) to deprive the courts of jurisdiction and would have no reason ever to invoke the EWSAA; § 1083(c)(4) would be surplusage." JA329. But the EWSAA authority *expired* long before the NDAA. Thus, the President had ample reason to invoke the EWSAA in 2003, because Section 1605(a)(7) was still in effect then. Nor was Section 1083(c)(4) surplusage. It was originally drafted prior to the veto, without contemplation of the addition of a waiver authority. The President's exercise of that authority has now rendered that provision—like Section 1605A itself—inapplicable as to Iraq. But if the President had not exercised the waiver, or had exercised it only in part, Section 1083(c)(4) would not have been redundant for the reasons set forth above (although it would have been ineffective as to the prior EWSAA determination).[15]

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[15] Contrary to the D.C. Circuit's reasoning, JA329, nothing in NDAA § 1083(d)(2)(C), which allows the waiver authority to affect pending cases, overrides the repeal of Section 1605(a)(7). If the President had delayed exercising the waiver, it would apply to pending cases under Section 1605A. Moreover, the waiver would also affect pending cases—including *Beaty* and *Simon*—convertible or converted to Section 1605A under NDAA §§ 1083(c)(2) and (3).

If Congress had truly intended to overturn the normal rule that jurisdictional repealers apply to pending cases, it would have done so directly—and certainly not through cryptic tea leaves scattered across Section 1083. In fact, the NDAA's intent and import is clear: Section 1605A is the only extant basis for FSIA jurisdiction based on a terrorism-sponsor designation, and that provision has been waived as to Iraq in accordance with authority that Congress expressly granted to the President.

III. THE RESTORATION OF IRAQ'S SOVEREIGN IMMUNITY EFFECTUATES IMPORTANT FOREIGN POLICIES.

This case cannot be divorced from the foreign policy concerns that underlie it. Before the FSIA, the Executive determined when foreign nations were entitled to immunity, and it was "not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." *Republic of Mexico*, 324 U.S. at 35. This case involves a limited restoration of this authority to the Executive. The President determined, based on *current* foreign policy concerns, that the new, democratic government of Iraq—now an ally in the fight against terrorism rather than a sponsor of it—should be freed from the punitive sanctions imposed on terrorism-sponsoring regimes.[16] That determination—fully authorized by statute and made by the branch of government responsible for formulating

[16] *See also* Br. for the U.S. as Amicus Curiae 17, No. 07-1090 (filed Dec. 5, 2008) (confirming that "the significant threat posed to Iraq's stability and redevelopment by terrorism-related lawsuits and enforcement actions has not diminished in the intervening years since the *Acree* decision").

foreign policy—should be respected rather than countermanded.

The determination effectuated the basic rationale of foreign sovereign immunity, which is predicated on the "perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other." *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cr.) 116, 137 (1812). Thus, how the United States treats other nations in its courts is fair game for how those nations will treat the United States in their courts. *See Lauritzen* v. *Larsen*, 345 U.S. 571, 582 (1953) ("nor should we forget that any contact which we hold sufficient to warrant application of *our* law to a foreign transaction will logically be as strong a warrant for a foreign country to apply *its* law to an American transaction") (emphasis supplied).

When Iraq was governed by an outlaw regime with which the United States had little interaction, former Section 1605(a)(7) was part of U.S. foreign policy to punish and marginalize that regime. But a dramatically different policy is now in place. The United States has forged deep ties with Iraq, and continues to be actively seeking to build and strengthen the new government and Iraq's economy. As the President determined, the continued imposition of sanctions such as former Section 1605(a)(7) threatens that critical relationship and U.S. foreign policies. The Saddam Hussein regime inflicted incalculable damage and suffering on the people of Iraq—vastly greater than the harm alleged in these cases. As a consequence, the new Government of Iraq tried and judged Saddam Hussein (and other former senior officials of the

regime) for crimes against the Iraqi people. On the order of Prime Minister Nouri al-Maliki following the judgment of the Iraqi court, Saddam Hussein was executed for those crimes. Yet the D.C. Circuit countermanded Presidential determinations and held that these plaintiffs were entitled to seek further retribution from the people of Iraq, who were victims themselves of the Hussein regime.

Moreover, U.S. involvement in Iraq is now far greater than any involvement of the Saddam Hussein regime with U.S. citizens. And that U.S. involvement has, unfortunately, led to significant grievances on the part of Iraqi citizens. It is therefore not unreasonable to think that if Iraq's immunity from suit for public acts is not recognized in the United States, some in Iraq may seek the same treatment for the United States in Iraq.[17]

This is not just an academic debate. Imperative foreign policy concerns underlie the President's valid exercise of the authority granted him by Congress. For instance, immunity for U.S. personnel in Iraq was a key component of the landmark Agreement Between the United States of America and the Republic of Iraq providing for the Status of U.S. Forces in Iraq recently concluded between Iraq and the United States. *See* Agreement Between the

[17] *See, e.g.*, Gartenstein-Ross, *supra*, at 918 ("It is difficult to formulate a principle that would allow terrorism exception suits in U.S. courts and simultaneously prevent foreign courts from entertaining suits directed at the United States or its allies for their foreign policy."); Amy Falls, *Acree* v. *Republic of Iraq: Holding a Fragile, U.S.-Backed Government Civilly Liable for the Wrongdoings of the Previous, Ousted Regime*, 73 Geo. Wash. L. Rev. 880, 893 (2005) (*Acree* holding "could potentially devastate the already precarious foreign relationship between the United States and Iraq").

United States of America and the Republic of Iraq, art. 12 (effective Jan. 1, 2009) ("Status of Forces Agreement" or "SOFA") (www.mnf-iraq.com/images/CGs_Messages/security_agreement.pdf). The SOFA, however, will be put to a popular referendum in Iraq by July 2009, and a vote of disapproval would void the agreement. *See* Alissa Rubin & Campbell Robertson, *Iraq Backs Deal That Sets End of U.S. Role*, N.Y. Times, Nov. 28, 2008, at A1.

A denial of Iraq's immunity here could well affect that vote. Indeed, it was reported that SOFA opponents in Iraq's Parliament raised concerns about whether "Iraqi assets would continue to be protected against claims that could not only consume billions of dollars but also make it difficult for Iraq to sell oil and move the proceeds through banks," specifically including pending claims under former Section 1605(a)(7).[18] These opponents, it was reported, sought U.S. Government assurances that Iraq's immunity would be respected. *Id.*

Thus, the current bilateral relationship between the two States would be adversely impacted if claims by U.S. plaintiffs against the former Iraqi regime may proceed against the new Government of Iraq while reciprocal claims by Iraqis against the United States Government (which would no doubt be

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[18] James Glanz & Steven Myers, *Iraqi Foes of Security Deal Seek to Shield Assets*, N.Y. Times, Nov. 24, 2008, at A6 (concerns included claims "by Americans who were badly treated as prisoners of war or used as 'human shields' against American bombardment in the 1991 war," and claims "that Mr. Hussein was * * * behind the Oklahoma City bombing in 1995 or the World Trade Center attacks on Sept. 11, 2001"). These descriptions cover pending Section 1605(a)(7) cases against Iraq. *See supra* note 3.

numerous) may not. Currently, there is political impetus and support within Iraq to handle such reciprocal claims by Iraqis against the United States through a State-to-State agreed process (as good relations between respectful allies demands). However, should claims by U.S. plaintiffs against the former Saddam regime be allowed to proceed in U.S. courts against the new Government of Iraq, then that impetus is more than likely to disappear. In such circumstances, the pressure to subject the United States and its soldiers and contractors to the full jurisdiction of Iraqi courts will likely increase in the Iraqi Parliament and the councils of the Government of Iraq. Such developments obviously would complicate the current good working relationship between the two nations.

Abrogation of Iraq's sovereign immunity is also likely to cause adverse economic consequences for the United States. To date, Iraq has elected to keep the sizeable funds of the Development Fund for Iraq—earmarked for Iraq's reconstruction—in the United States. And Iraq has elected to denominate its oil sales in dollars, resulting in a flow of funds through the U.S. Federal Reserve. These actions reflect the ever-increasing economic ties between the now-friendly nations. If, however, those funds were threatened with attachment to satisfy judgments or potential judgments arising from the conduct of the former regime, the Government of Iraq understandably would be compelled to take measures to protect its sovereign assets—which may include removing them from the United States and redenominating oil transactions in another currency. As the President determined, such prudent actions would adversely affect the bilateral economic relationship.

See JA413 ("By potentially forcing a close U.S. ally to withdraw significant funds from the U.S. financial system, section 1083 would cast doubt on whether the United States remains a safe place to invest and to hold financial assets. Iraqi entities would be deterred from engaging in commercial partnerships with U.S. businesses for fear of entangling assets in lawsuits.").

It is for reasons such as these that foreign sovereign immunity has always "reflect[ed] *current* political realities and relationships, and aims to give foreign states and their instrumentalities some *present* 'protection from the inconvenience of suit as a gesture of comity.'" *Republic of Austria*, 541 U.S. at 696 (first emphasis added; citation omitted). Thus, before the FSIA, courts would "surrender" their jurisdiction upon an Executive determination of immunity. *Republic of Mexico*, 324 U.S. at 34. For example, in *Rich* v. *Naviera Vacuba S.A.*, 295 F.2d 24, 26 (4th Cir. 1961), the court enforced a State Department certification of immunity "without further inquiry" in a pending case, even though the foreign nation had previously waived its own immunity in the case.

So too here, the President's determinations effectuated the current foreign policy of the United States that seeks to rebuild and support Iraq, and the new diplomatic relationship between the nations. That policy and relationship would be endangered by continuing to subject the new government of Iraq to onerous lawsuits seeking billons in damages based on a sanction—the stripping of Iraq's sovereign immunity—that applies to terrorism-sponsoring regimes. As this Court has noted, "claims remaining in the aftermath of hostilities may be 'sources of

friction' acting as an 'impediment to resumption of friendly relations' between the countries involved." *Garamendi*, 539 U.S. at 420 (citations omitted).

The recognition of Iraq's sovereign immunity, moreover, will not deprive plaintiffs of the ability to pursue claims for compensation. Rather, it means that those claims will have to be pursued as claims against allied nations for the misdeeds of hostile former regimes have always been pursued in the past: through State-to-State negotiations, rather than subjecting each nation to coercive lawsuits in the courts of the other. For example, courts have uniformly rejected claims against Germany and Japan for the acts of their prior regimes. *See, e.g.*, *Hwang Geum Joo* v. *Japan*, 413 F.3d 45, 50 (D.C. Cir. 2005) (effectuating U.S. policy "that all war-related claims against Japan be resolved through government-to-government negotiations rather than through private tort suits"); *Princz* v. *Fed. Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994).

Iraq should be treated no differently. The NDAA sets forth the "sense of Congress" that the President "should work with the Government of Iraq on a state-to-state basis" to resolve waived claims against Iraq. NDAA § 1083(d)(4). And that has long been the Executive's policy as well. *See* U.S. *Beaty* Statement of Interest at 16 n.9 (supporting recognition of Iraq's sovereign immunity in U.S. courts and noting that pending claims should be addressed following "the establishment of a successor government capable of negotiating the diplomatic or other resolution of claims arising from the misdeeds of its predecessor") (JA83). Appropriately, however, any State-to-State discussions would have to encompass myriad, complex issues on both sides of

the table. "[O]ur national interest will be better served in such cases if the wrongs to suitors, involving our relations with a friendly foreign power, are righted through diplomatic negotiations rather than by the compulsions of judicial proceedings." *Republic of Peru*, 318 U.S. at 589.

Just as the United States undoubtedly would expect that its accountability in Iraq for noncommercial acts involving Iraqi citizens be addressed through diplomatic negotiations, the President made a reasoned determination—amply supported by broad statutory authority—that claims involving the Saddam Hussein regime should be addressed diplomatically as well. Whether this case is considered under the EWSAA or the NDAA, the result is the same. There is no extant statutory basis for abrogation of Iraq's sovereign immunity and thus no basis for subject matter jurisdiction.

CONCLUSION

For the foregoing reasons, the judgments below should be reversed with instructions to dismiss the complaints for lack of subject matter jurisdiction.

Respectfully submitted,

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APPENDIX

STATUTORY PROVISIONS

Statute	Page
28 U.S.C. § 1330	1a
28 U.S.C. § 1605(a)(7) (2000) (repealed)	2a
Emergency Wartime Supplemental Authorization Act, 2003, Pub. L. No. 108-011, § 1503, 117 Stat. 559, 579 (2003)	4a
National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338 (2008)	6a

28 U.S.C. § 1330

Sec. 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

28 U.S.C. § 1605(a)(7) (2000) (repealed)

Sec. 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

* * *

(7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph—

(A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act or the act is related to Case Number 1:00CV03110(EGS) in the United States District Court for the District of Columbia; and

(B) even if the foreign state is or was so designated, if—

(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or

(ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred.

Emergency Wartime Supplemental Authorization Act, 2003, Pub. L. No. 108-011, § 1503, 117 Stat. 559, 579 (2003)

SEC. 1503. The President may suspend the application of any provision of the Iraq Sanctions Act of 1990: *Provided*, That nothing in this section shall affect the applicability of the Iran-Iraq Arms Non-Proliferation Act of 1992 (Public Law 102-484), except that such Act shall not apply to humanitarian assistance and supplies: *Provided further*, That the President may make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or any other provision of law that applies to countries that have supported terrorism: *Provided further*, That military equipment, as defined by title XVI, section 1608(1)(A) of Public Law 102-484, shall not be exported under the authority of this section: *Provided further*, That section 307 of the Foreign Assistance Act of 1961 shall not apply with respect to programs of international organizations for Iraq: *Provided further*, That provisions of law that direct the United States Government to vote against or oppose loans or other uses of funds, including for financial or technical assistance, in international financial institutions for Iraq shall not be construed as applying to Iraq: *Provided further*, That the President shall submit a notification 5 days prior to exercising any of the authorities described in this section to the committee on Appropriations of each House of the Congress, the Committee on Foreign Relations of the Senate, and the Committee on International Relations of the House of Representatives: *Provided further*, That not more than 60 days after enactment of this Act and every 90 days thereafter the President shall submit a

report to the Committee on Appropriations of each House of the Congress, the Committee on Foreign Relations of the Senate, and the Committee on International Relations of the House of Representatives containing a summary of all licenses approved for export to Iraq of any item on the Commerce Control List contained in the Export Administration Regulations, 15 CFR Part 774, Supplement 1, including identification of end users of such items: *Provided further*, That the authorities contained in this section shall expire on September 30, 2004, or on the date of enactment of a subsequent Act authorizing assistance for Iraq and that specifically amends, repeals or otherwise makes inapplicable the authorities of this section, whichever occurs first.

National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083, 122 Stat. 3, 338 (2008)

SEC. 1083. TERRORISM EXCEPTION TO IMMUNITY.

(a) TERRORISM EXCEPTION TO IMMUNITY—

(1) IN GENERAL—Chapter 97 of title 28, United States Code, is amended by inserting after section 1605 the following:

"§ 1605A. Terrorism exception to the jurisdictional immunity of a foreign state

"(a) IN GENERAL—

"(1) NO IMMUNITY—A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

"(2) CLAIM HEARD—The court shall hear a claim under this section if—

"(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed

under this section or was so designated within the 6-month period before the claim is filed under this section; or

"(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

"(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred—

"(I) a national of the United States;

"(II) a member of the armed forces; or

"(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

"(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

"(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

"(b) LIMITATIONS—An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) not later than the latter of—

"(1) 10 years after April 24, 1996; or

"(2) 10 years after the date on which the cause of action arose.

"(c) PRIVATE RIGHT OF ACTION—A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to—

"(1) a national of the United States,

"(2) a member of the armed forces,

"(3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

"(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic

damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

"(d) ADDITIONAL DAMAGES—After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

"(e) SPECIAL MASTERS—

"(1) IN GENERAL—The courts of the United States may appoint special masters to hear damage claims brought under this section.

"(2) TRANSFER OF FUNDS—The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

"(f) APPEAL—In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

"(g) PROPERTY DISPOSITION.-

(1) IN GENERAL—In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending

action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of lis pendens upon any real property or tangible personal property that is—

"(A) subject to attachment in aid of execution, or execution, under section 1610;

"(B) located within that judicial district; and

"(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

"(2) NOTICE—A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

"(3) ENFORCEABILITY—Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

"(h) DEFINITIONS—For purposes of this section—

"(1) the term 'aircraft sabotage' has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

"(2) the term 'hostage taking' has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

"(3) the term 'material support or resources' has the meaning given that term in section 2339A of title 18;

"(4) the term 'armed forces' has the meaning given that term in section 101 of title 10;

"(5) the term 'national of the United States' has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

"(6) the term 'state sponsor of terrorism' means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

"(7) the terms 'torture' and 'extrajudicial killing' have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).".

(2) AMENDMENT TO CHAPTER ANALYSIS—The table of sections at the beginning of chapter 97 of title 28, United States Code, is amended by inserting after the item relating to section 1605 the following:

"1605A. Terrorism exception to the jurisdictional immunity of a foreign state.".

(b) CONFORMING AMENDMENTS—

(1) GENERAL EXCEPTION—Section 1605 of title 28, United States Code, is amended—

(A) in subsection (a)—

(i) in paragraph (5)(B), by inserting "or" after the semicolon;

(ii) in paragraph (6)(D), by striking "; or" and inserting a period; and

(iii) by striking paragraph (7);

(B) by repealing subsections (e) and (f); and

(C) in subsection (g)(1)(A), by striking "but for subsection (a)(7)" and inserting "but for section 1605A".

(2) COUNTERCLAIMS—Section 1607(a) of title 28, United States Code, is amended by inserting "or 1605A" after "1605".

(3) PROPERTY—Section 1610 of title 28, United States Code, is amended—

(A) in subsection (a)(7), by striking "1605(a)(7)" and inserting "1605A";

(B) in subsection (b)(2), by striking "(5), or (7), or 1605(b)" and inserting "or (5), 1605(b), or 1605A";

(C) in subsection (f), in paragraphs (1)(A) and (2)(A), by inserting "(as in effect before the enactment of section 1605A) or section 1605A" after "1605(a)(7)"; and

(D) by adding at the end the following:

"(g) PROPERTY IN CERTAIN ACTIONS—

"(1) IN GENERAL—Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—

"(A) the level of economic control over the property by the government of the foreign state;

"(B) whether the profits of the property go to that government;

"(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

"(D) whether that government is the sole beneficiary in interest of the property; or

"(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

"(2) UNITED STATES SOVEREIGN IMMUNITY INAPPLICABLE—Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.

"(3) THIRD-PARTY JOINT PROPERTY HOLDERS—Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.".

(4) VICTIMS OF CRIME ACT—Section 1404C(a)(3) of the Victims of Crime Act of 1984 (42 U.S.C. 10603c(a)(3)) is amended by striking "December 21, 1988 with respect to which an investigation or" and inserting "October 23, 1983, with respect to which an investigation or civil or criminal".

(c) APPLICATION TO PENDING CASES—

(1) IN GENERAL—The amendments made by this section shall apply to any claim arising under section 1605A of title 28, United States Code.

(2) PRIOR ACTIONS—

(A) IN GENERAL—With respect to any action that—

(i) was brought under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208), before the date of the enactment of this Act,

(ii) relied upon either such provision as creating a cause of action,

(iii) has been adversely affected on the grounds that either or both of these provisions fail to create a cause of action against the state, and

(iv) as of such date of enactment, is before the courts in any form, including on appeal or motion under rule 60(b) of the Federal Rules of Civil Procedure,

that action, and any judgment in the action shall, on motion made by plaintiffs to the United States district court where the action was initially brought, or judgment in the action was initially entered, be given effect as if the action had originally been filed under section 1605A(c) of title 28, United States Code.

(B) DEFENSES WAIVED—The defenses of res judicata, collateral estoppel, and limitation period are waived-

(i) in any action with respect to which a motion is made under subparagraph (A), or

(ii) in any action that was originally brought, before the date of the enactment of this Act, under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208), and is refiled under section 1605A(c) of title 28, United States Code, to the extent such defenses are based on the claim in the action.

(C) TIME LIMITATIONS—A motion may be made or an action may be refiled under subparagraph (A) only—

(i) if the original action was commenced not later than the latter of—

(I) 10 years after April 24, 1996; or

(II) 10 years after the cause of action arose; and

(ii) within the 60-day period beginning on the date of the enactment of this Act.

(3) RELATED ACTIONS—If an action arising out of an act or incident has been timely commenced under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208), any other action arising out of the same act or incident may be brought under section 1605A of title 28, United States Code, if the action is commenced not later than the latter of 60 days after—

(A) the date of the entry of judgment in the original action; or

(B) the date of the enactment of this Act.

(4) PRESERVING THE JURISDICTION OF THE COURTS—Nothing in section 1503 of the Emergency Wartime Supplemental Appropriations Act, 2003 (Public Law 108-11, 117 Stat. 579) has ever authorized, directly or indirectly, the making inapplicable of any provision of chapter 97 of title 28, United States Code, or the removal of the jurisdiction of any court of the United States.

(d) APPLICABILITY TO IRAQ—

(1) APPLICABILITY—The President may waive any provision of this section with respect to Iraq, insofar as that provision may, in the President's determination, affect Iraq or any agency or instrumentality thereof, if the President determines that—

(A) the waiver is in the national security interest of the United States;

(B) the waiver will promote the reconstruction of, the consolidation of democracy in, and the relations of the United States with, Iraq; and

(C) Iraq continues to be a reliable ally of the United States and partner in combating acts of international terrorism.

(2) TEMPORAL SCOPE—The authority under paragraph (1) shall apply—

(A) with respect to any conduct or event occurring before or on the date of the enactment of this Act;

(B) with respect to any conduct or event occurring before or on the date of the exercise of that authority; and

(C) regardless of whether, or the extent to which, the exercise of that authority affects any action filed before, on, or after the date of the exercise of that authority or of the enactment of this Act.

(3) NOTIFICATION TO CONGRESS—A waiver by the President under paragraph (1) shall cease to be effective 30 days after it is made unless the President has notified Congress in writing of the basis for the waiver as determined by the President under paragraph (1).

(4) SENSE OF CONGRESS—It is the sense of the Congress that the President, acting through the Secretary of State, should work with the Government of Iraq on a state-to-state basis to ensure compensation for any meritorious claims based on terrorist acts committed by the Saddam Hussein regime against individuals who were United States nationals or members of the United States Armed Forces at the time of those terrorist acts and whose claims cannot be addressed in courts in the United

States due to the exercise of the waiver authority under paragraph (1).

(e) SEVERABILITY—If any provision of this section or the amendments made by this section, or the application of such provision to any person or circumstance, is held invalid, the remainder of this section and such amendments, and the application of such provision to other persons not similarly situated or to other circumstances, shall not be affected by such invalidation.